# **PUBLIC VERSION**

# Before the COPYRIGHT ROYALTY BOARD LIBRARY OF CONGRESS Washington, D.C.

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	)
In the Matter of	)
DIGITAL PERFORMANCE RIGHT IN	) Docket No. 2005-5 CRB DTNSRA
SOUND RECORDINGS AND EPHEMERAL	)
RECORDINGS FOR A NEW SUBSCRIPTION	)
SERVICE	)
	)

# WRITTEN DIRECT STATEMENT OF SOUNDEXCHANGE, INC.

Volume 6 of 6
Designated Testimony from 2005-1 CRB DTRA:
Exhibits to Written and Oral Testimony of Barrie Kessler

Donald B. Verrilli, Jr. (DC Bar 420434)
Thomas J. Perrelli (DC Bar 438929)
Mark D. Schneider (DC Bar 385989)
Michael B. DeSanctis (DC Bar 460961)
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Counsel for SoundExchange, Inc.

# **PUBLIC VERSION**

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mschneider@jenner.com
mdesanctis@jenner.com

Counsel for SoundExchange, Inc.

# Written Direct Statement of SoundExchange, Inc. Volume 6 of 6: Designated Testimony from 2005-1 CRB DTRA: Exhibits to Written and Oral Testimony of Barrie Kessler

Exhibits to Written Testimony - See attached index.

Exhibits to Oral Testimony Admitted into Evidence

- Services Exhibit 98: 2004 webcaster payments to SoundExchange (RESTRICTED)
- Services Exhibit 154: SoundExchange Analysis sheet re: Receipt and Enforcement Effectiveness Tracking (as of June 2, 2006) (RESTRICTED)
- Services Exhibit 155: SoundExchange's Responses and Objections to Interrogatory No. 9 from First Set of Interrogatories to SoundExchange by DiMA, et al. (Jan. 27, 2006) (RESTRICTED)
- Services Exhibit 157: Webcasting Performance and Ephemeral License Agreement between SoundExchange and National Public Radio, Inc. (NPR) (Nov. 13, 2001) (RESTRICTED)
- Services Exhibit 158: SoundExchange Financial Statement, Inception through Calendar 2005

# Exhibits Sponsored by Barrie L. Kessler

211 DP	Flow-chart illustrating SoundExchange's royalty collection and distribution procedures
212 DP	Sample SoundExchange Statement of Account
213 DP	Sample SoundExchange Notice of Election
214 DP	Sample SoundExchange Report of Use
252 DP	Sample SoundExchange Copyright Owner Statement reflecting performances associated with royalty payment
253 DP	Sample SoundExchange Artist Statement reflecting performances associated with royalty payment
259 DP	Sample Statement of account filed by satellite carrier Primetime 24 Joint Venture (Copyright Office Form SC)
260 DP	Sample statement of account filed by satellite carrier DirecTV, Inc. (Copyright Office Form SC)
261 DP	Sample statement of account filed by satellite carrier DirecTV Latin America (Copyright Office Form SC)
262 DP	Sample statement of account filed by cable television system Galaxy Cable Inc. (Copyright Office Form SA1-2)
263 DP	Sample statement of account filed by cable television system ComCast of Virginia (Copyright Office Form SA1-2)
264 DP	Sample statement of account filed by cable television system Southwest Cablevision (Copyright Office Form SA1-2)
265 DP	Agreement relating to distribution of satellite royalty fees by the Copyright Office
407 DP	Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, 67 Fed. Reg. 45,239 (July 8, 2002) ("Webcaster I Librarian's Decision")
411 DP	Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings; Final Rule and order, 63 Fed. Reg. 25,394, 25,412 (May 8, 1998) ("PES I Librarian's Decision")
414 DP	Reply Comments of the Recording Industry Association of America, Inc., in Docket No. RM 2002-1A (Apr. 26, 2002)
415 DP	Comments of the Recording Industry Association of America, Inc., in Docket No. RM 2002-1A (Apr. 5, 2002)
416 DP	Comments of SoundExchange in Docket No. RM 2002-1H (May 27, 2005)

417 DP	Comments of SoundExchange, Inc., in RM 2005-2 in response to CRB request for Supplemental Comments (Aug. 26, 2005)
418 DP	Reply Comments of SoundExchange, Inc. in RM 2005-2 in response to CRB request for Supplemental Comments (Sept. 16, 2005)

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# ORIGINAL

RECEIVED

OCT 3 0 2006

Copyright Royalty Board



# **Distribution Services** Model

Matching: Once logs are checked for compliance, they are matched through an automatic and manual matching process.

Logs and payments are

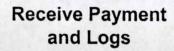
are uploaded to the

period.

received from Licensees. Logs

Research designates the appropriate sound recording copyright owner and artist on unmatched performances.

Account Assignment: New performances are assigned accounts based on the artist and sound recording copyright owner information on the performance.

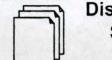




THE THE RESERVED AND THE TOP RESIDENCE SOME IN THE

Adjustments: For previously distributed royalties that were distributed based on incorrect or incomplete information, adjustments to performances are made, affecting future distributions.

**SERA** 



Distribution and Settlement

SoundExchange system and analyzed for compliance based on License and Licensee requirements. Fees are then entered for the distribution

Royalties for each performance in the SoundExchange database are distributed. Each entity receives a check and a statement reflecting the performances for which they have earned royalties as well as the License source. Based on the received statement, entities inform SoundExchange of any errors, resulting in potential adjustments to performances.

Report

Load

Research

Assign Accounts

Distribute

Adjust

# SX Exhibit 212 DP

# STATEMENT OF ACCOUNT FOR AN ELIGIBLE NONSUBSCRIPTION TRANSMISSION SERVICE ELECTING PER PERFORMANCE OPTION - 2005



# Send your PAYMENT and STATEMENT OF ACCOUNT to:

ndexchange SoundExchange, Inc.
Attn: Royalty Administration
1330 Connecticut Avenue, N.W.

Suite 330 Washington, D.C. 20036

Call SoundExchange at (202)828-0120 for its Federal Tax Identification Number.

FOR THE PERIOD:	FOR ANY MONTH DURING THE PEI		
Please identify the month for	which this Statement of Account is filed (the	e "Month"):	
ENTITY / SERVICE NAME	<b>:</b>		
URL:			
ROYALTIES FOR THE SE	OF ACCOUNT IF YOU HAVE PREVIOUS RIVICE AND PERIOD NOTED ABOVE OT FILE AN ELECTION FORM).	JSLY ELECTEE ON A PER PE	D <sup>1</sup> TO PAY RFORMANCE <sup>2</sup>
SECTION I. PER P	ERFORMANCE ROYALTY CALCULA	TION	
		41. Dt1	Ell in the meanth
Please enter the number of nformation for previous mo	f Performances transmitted for the Mor onths in 2005, as it is necessary to calc	ith. Please also ulate the annual	III in the month I minimum fee.
Please enter the number of nformation for previous mo	f Performances transmitted for the Moronths in 2005, as it is necessary to calc	ulate the annual	l minimum fee.
Please enter the number of information for previous mo 1. January	f Performances transmitted for the Mor onths in 2005, as it is necessary to calc	ulate the annual	l minimum fee.
nformation for previous mo	f Performances transmitted for the Mor onths in 2005, as it is necessary to calc	ulate the annual	MCES
nformation for previous mo	f Performances transmitted for the Mor onths in 2005, as it is necessary to calc	ulate the annual	MCES
nformation for previous mo 1. January  2. February	f Performances transmitted for the Mor onths in 2005, as it is necessary to calc	ulate the annual	I minimum fee.  NCES  1
nformation for previous mo  1. January  2. February  3. March	f Performances transmitted for the Mor onths in 2005, as it is necessary to calc	ulate the annual	I minimum fee.  NCES  1 2 3

Last Revised, 3/25/05

Page 1 of 3

# STATEMENT OF ACCOUNT FOR AN ELIGIBLE NONSUBSCRIPTION TRANSMISSION SERVICE ELECTING PER PERFORMANCE OPTION - 2005

r	PERFORMANCES
7. July	7
8. August	8
9. September	9
10. October	10
11. November	11
12. December	12
13. Add lines 1-12	13
<ul><li>14. Multiply line 13 by .96</li><li>15. Multiply line 14 by \$0.000762 (rounded to the nearest cent). This is your Per Performance Liability.</li></ul>	14 \$ 15
SECTION II. ANNUAL LIABILITY	
16. Enter the maximum number of channels or stations of programming transmitted by the service or entity since January 1, 2005. If "5" or more, then enter "5" only.	16
17. If line 16 is less than "5", then multiply line 16 by \$500. If the number of your channels or stations transmitted since January 1, 2005, is greater than or equal to "5", then enter \$2,500. This is your Annual Minimum Fee Liability for 2005.	h 17
18. Enter the greater of lines 15 or 17.	18
19. Enter amounts previously paid to SoundExchange for the months January 2005 through the current date (inclusive of any payments previously made for your Annual Minimum Fee Liability for 2005). Do not include in this amount any payments made during 2005 for any prior year (rounded to the nearest cent).	19
20. Subtract line 19 from line 18 (rounded to the nearest cent). THIS IS THE AMOUNT THAT MUST BE PAID TO SOUNDEXCHANGE FOR THE CURRENT MONTH. PAYMENT IS DUE 45 DAYS AFTER THE END OF THE	200

<sup>3</sup>See 69 Fed. Reg. at 5698 (to be codified at 37 C.F.R. 62.3(d)(2)).

# **CERTIFICATION PAGE**

Last Revised, 3/25/05

# STATEMENT OF ACCOUNT FOR AN ELIGIBLE NONSUBSCRIPTION TRANSMISSION SERVICE ELECTING PER PERFORMANCE OPTION - 2005

I, the undersigned owner or agent of the Licensee, or officer or partner, if the Licensee is a corporation or partnership, have examined this Statement of Account and hereby certify that the information provided herein is accurate and that I am authorized to sign this Statement of Account on behalf of the Statutory Licensee identified above.

Signature:	
Name:	
E-mail Address:	
Address:	
City, State, Zip:	
Telephone Number:	
Date:	
that rely on the statutory lice eligible for statutory licensis compliance with all applicat a service's payment does no compliance with the require SoundExchange does not a	nake determinations as to whether each of the many services enses under Sections 112 and 114 of the Copyright Act is ng, nor does it continuously verify that such services are in full ple requirements. Accordingly, SoundExchange's acceptance of ot express or imply any acknowledgment that a service is in ments of the statutory licenses.  cknowledge receipt of Statements of Account. If you wish to very, please mail this form by Certified Mail, return receipt
Last Revised, 3/25/05	Page 3 of 3

# SHORT FORM STATEMENT OF ACCOUNT FOR AN ELIGIBLE NONSUBSCRIPTION TRANSMISSION SERVICE ELECTING PER PERFORMANCE OPTION - 2005

Send your PAYMENT and STATEMENT OF ACCOUNT to:

soundexchange

SoundExchange, Inc. Attn: Royalty Administration 1330 Connecticut Avenue, N.W. Suite 330 Washington, D.C. 20036

Call SoundExchange at (202)828-0120 for its Federal Tax Identification Number.

due 45 days after the end of the Month.

FOR THE 2005 CALENDAR MONTH OF (the "MOI	NTH"): (enter name of month)
ENTITY / SERVICE NAME:	
URL:	
THIS SHORT FORM STATEMENT OF ACCOUNT I THAT HAVE PREVIOUSLY EXCEEDED AND PAID	
Please enter the number of Performances transmitte	d for the Month.
	PERFORMANCES
1 Current Month	1
2 Line 1 multiplied by .96 (calculated)	- 2
<sup>3</sup> Line 2 multiplied by \$0.000762 ( <i>calculated</i> ).	
This is the amount you must pay to SoundExchange for the Month. Payment	ie
SoundExchange for the Worlds. Payment	19

| - | <br> | <br> | ~ | <br> | <br> | <br> | <br>· <b>-</b> | <br> | ••• •• | <b></b> . | <br>*** | <br> | <br>٠. | <b></b> | <br> | ~ | <br> | <br> | **** | <br> | <br> | <br> | <br> | <br> |  |
|---|------|------|---|------|------|------|----------------|------|--------|-----------|---------|------|--------|---------|------|------|------|------|------|------|------|------|---|------|------|------|------|------|------|------|------|--|

# SHORT FORM STATEMENT OF ACCOUNT FOR AN ELIGIBLE NONSUBSCRIPTION TRANSMISSION SERVICE ELECTING PER PERFORMANCE OPTION - 2005

# **CERTIFICATION PAGE**

I, the undersigned owner or agent of the Licensee, or officer or partner, if the Licensee is a corporation or partnership, have examined this Statement of Account and hereby certify that the information provided herein is accurate and that I am authorized to sign this Statement of Account on behalf of the Statutory Licensee identified above.

Signature:		
Name:		
E-mail Address:		
Address:		
City, State, Zip:		
Telephone Number:		
Date:		
statutory licenses under Section t continuously verify that such : SoundExchange's acceptance o	e determinations as to whether each of the many services that rely on the ns 112 and 114 of the Copyright Act is eligible for statutory licensing, nor does services are in full compliance with all applicable requirements. Accordingly, of a service's payment does not express or imply any acknowledgment that a e requirements of the statutory licenses.	
SoundExchange does not ackno confirmation of delivery, please	owledge receipt of Statements of Account. If you wish to receive mail this form by Certified Mail, return receipt requested.	

# STATEMENT OF ACCOUNT FOR AN ELIGIBLE NONSUBSCRIPTION TRANSMISSION SERVICE ELECTING AGGREGRATE TUNING HOUR OPTION - 2005

soundexchange

FOR THE PERIOD:

Send your PAYMENT and STATEMENT OF ACCOUNT to:

SoundExchange, Inc. Attn: Royalty Administration 1330 Connecticut Avenue, N.W. Suite 330 Washington, D.C. 20036

FOR ANY MONTH DURING THE PERIOD JANUARY - DECEMBER

Call SoundExchange at (202)828-0120 for its Federal Tax Identification Number.

2005

Footnotes on page 3

FOR THE 2005	CALENDAR MONTH C	F (the "MONTH"):			
ENTITY / SERV	ICE NAME:	TERMS.		····	
URL:	National Western				
USE THIS STAT	TEMENT OF ACCOUNTICE AND PERIOD NO	T IF YOU HAVE PRI TED ABOVE ON AN	EVIOUSLY ELECTED I AGGREGATE TUNI	0 <sup>1</sup> TO PAY ROYAL <sup>1</sup> NG HOUR <sup>2</sup> BASIS.	TIES
SECTION I.	AGGREGA	TE TUNING HOUR	ROYALTY CALCULA	ATION	
each category of	amount of Aggregate T f programming transmitt arlier months in 2005, a	ted for the current Me	onth. Please also fill ir	the monthly	
		Other Programming <sup>3</sup> (column a)	Non-Music Programming <sup>4</sup> (column b)	Broadcast Simulcast <sup>5</sup> Programming <sup>6</sup> (column c)	
1. Janu	ıary			- 14 - 14 - 14 - 14 - 14 - 14 - 14 - 14	1
2. Feb	ruary				2
3. Mar	ch			· · · · · · · · · · · · · · · · · · ·	3
4. Apri	ı	****			4
5. May				<del></del>	5
6. June	e				6
7. July					7
8. Aug	ust			***************************************	8

# STATEMENT OF ACCOUNT FOR AN ELIGIBLE NONSUBSCRIPTION TRANSMISSION SERVICE ELECTING AGGREGRATE TUNING HOUR OPTION - 2005

		Other Programming <sup>3</sup> (column a)	Non-Music Programming <sup>4</sup> (column b)	Broadcast Simulcast <sup>5</sup> Programming <sup>6</sup> (column c)								
9.	September				9							
10.	October				10							
11.	November				11							
12.	December				12							
13.	Add lines 1 – 12				13							
14.	Multiply cell 13a by \$0.011 are no Aggregate Tuning F			\$	14							
15.												
16.	Multiply cell 13c by \$0.008 are no Aggregate Tuning H				16							
17.	Programming, enter -0 Add lines 14 - 16. This is	your Aggregate Tu	ning Hour Liability.	\$   \$	16							

# SECTION II. ANNUAL LIABILITY

18.	Enter the maximum number of channels or stations of programming transmitted by the service or entity since January 1, 2005. If "5" or	
	more, then enter "5" only.	18
19.	If line 18 is less than "5", then multiply line 18 by \$500. If the number of your channels or stations transmitted since January 1,	
	2005, is greater than or equal to "5", then enter \$2,500.	\$ 19
20.	Enter the greater of lines 17 or 19. This is your 2005 statutory	[
	liability year-to-date.	\$ 20
21.	Enter amounts previously paid to SoundExchange for the months January 2005 through the current date (inclusive of any payments previously made for your Annual Minimum Fee Liability for 2005). Do not include in this amount any payments made during 2005 for any prior year (rounded to	
	the nearest cent).	\$ 21
22.	Subtract line 21 from line 20. THIS IS THE AMOUNT THAT MUST BE PAID TO SOUNDEXCHANGE FOR THE CURRENT MONTH.	
	PAYMENT IS DUE 45 DAYS AFTER THE END OF THE MONTH.	\$ 22

Foo	tnot	es on	page	9 3												
 						 	 	-m	 	 	 	 	 	mux	 	 

# STATEMENT OF ACCOUNT FOR AN ELIGIBLE NONSUBSCRIPTION TRANSMISSION SERVICE ELECTING AGGREGRATE TUNING HOUR OPTION - 2005

<sup>1</sup>The Notice of Election is located at http://soundexchange.com/licensee/documents/Notice\_of\_Election\_NonsubscriptionServic e\_2005.pdf

<sup>2</sup> "Aggregate Tuning Hours" has the meaning set forth in 69 Fed. Reg. 5693, 5695-96 (Feb. 6, 2004) (to be codified at 37 C.F.R. § 262.2) (http://soundexchange.com/licensee/documents/Fed Reg 2 6 04 000.pdf).

- <sup>3</sup> "Other Programming" is programming that is <u>not</u> Broadcast Simulcast Programming (defined in footnotes 5 and 6) or Non-Music Programming (defined in footnote 4). By way of example, an Internet-only classic rock station would be Other Programming. <u>See</u> 69 Fed. Reg. at 5697 (to be codified at 37 C.F.R. § 262.3(a)(1)(ii)(C)).
- <sup>4</sup> "Non-Music Programming" is programming that is reasonably classified as news, talk, sports or business programming. <u>See</u> 69 Fed. Reg. at 5697 (to be codified at 37 C.F.R. § 262.3(a)(1)(ii)(A)).
- <sup>5</sup> "Broadcast Simulcast" means (1) A simultaneous Internet transmission or retransmission of an over-the-air terrestrial AM or FM radio broadcast, including one with previously broadcast programming substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained and one with substitute advertisements, and (2) An Internet transmission in accordance with 17 U.S.C. § 114(d)(2)(C)(iii) of an archived program, which program was previously broadcast over-the-air by a terrestrial AM or FM broadcast radio station, in either case whether such Internet transmission or retransmission is made by the owner and operator of the AM or FM radio station that makes the broadcast or by a third party. See 69 Fed. Reg. at 5696 (to be codified at 37 C.F.R. § 262.2).
- <sup>6</sup> "Broadcast Simulcast Programming" is programming contained in a Broadcast Simulcast that is not Non-Music Programming. By way of example, the retransmission on the Internet of a classic rock terrestrial radio station would be Broadcast Simulcast Programming.

<sup>&</sup>lt;sup>7</sup> See 69 Fed. Reg. at 5698 (to be codified at 37 C.F.R. § 262.3(d)(2)).

# STATEMENT OF ACCOUNT FOR AN ELIGIBLE NONSUBSCRIPTION TRANSMISSION SERVICE ELECTING AGGREGATE TUNING HOUR OPTION - 2005

# **CERTIFICATION PAGE**

I, the undersigned owner or agent of the Licensee, or officer or partner, if the Licensee is a corporation or partnership, have examined this Statement of Account and hereby certify that the information provided herein is accurate and that I am authorized to sign this Statement of Account on behalf of the Statutory Licensee identified above.

Signature:					
Name:					
E-mail Address:					
Address:					
City, State, Zip:	>				
Telephone Number:					
Date:					
SoundExchange does not make determinations as to whether each of the many services that rely on the statutory licenses under Sections 112 and 114 of the Copyright Act is eligible for statutory licensing, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, SoundExchange's acceptance of a service's payment does not express or imply any acknowledgment that a service is in compliance with the requirements of the statutory licenses.					

SoundExchange does not acknowledge receipt of Statements of Account. If you wish to receive confirmation of delivery, please mail this form by Certified Mail, return receipt requested.

Last Revised, 3/25/05

# SHORT FORM STATEMENT OF ACCOUNT FOR AN ELIGIBLE NONSUBSCRIPTION TRANSMISSION SERVICE

# **ELECTING AGGREGATE TUNING HOUR OPTION - 2005**

soundexchange

Send your PAYMENT and STATEMENT OF ACCOUNT to:

SoundExchange, Inc. Attn: Royalty Administration 1330 Connecticut Avenue, N.W. Suite 330 Washington, D.C. 20036

Call SoundExchange at (202)828-0120 for its Federal Tax Identification Number.

FOR THE 2005 CALENDAR MONTH	OF (the "MONTH"):	
		(enter name of month)
ENTITY / SERVICE NAME:		
URL:		

THIS SHORT FORM STATEMENT OF ACCOUNT IS TO BE USED ONLY BY THOSE LICENSES THAT HAVE PREVIOUSLY EXCEEDED AND PAID THE ANNUAL MINIMUM FEE FOR 2005.

Please enter the amount of Aggregate Tuning Hours (rounded to the nearest minute) transmitted for each category of programming transmitted for the Month.

	Other Programming (column a)	Non-Music Programming (column b)	Broadcast Simulcast Programming (column c)	
1 Current Month				_ 1
2 Cell 1a multiplied by \$0.0117 (calculated)			\$ -	2
3 Cell 1b multiplied by \$0.000762 (calculated)			\$ -	3
4 Cell 1c multiplied by \$0.0088 (calculated)			\$ -	4
5 Sum of lines 2 to 4. This is the must pay to SoundExchange	-			
Payment is due 45 days follow	ving the end of		s -	5

# SHORT FORM STATEMENT OF ACCOUNT FOR AN ELIGIBLE NONSUBSCRIPTION TRANSMISSION SERVICE ELECTING AGGREGATE TUNING HOUR OPTION - 2005

# **CERTIFICATION PAGE**

I, the undersigned owner or agent of the Licensee, or officer or partner, if the Licensee is a corporation or partnership, have examined this Statement of Account and hereby certify that the information provided herein is accurate and that I am authorized to sign this Statement of Account on behalf of the Statutory Licensee identified above.

Signature:	
Name:	
E-mail Address:	
Address:	
City, State, Zip:	
Telephone Number:	
Date:	

SoundExchange does not make determinations as to whether each of the many services that rely on the statutory licenses under Sections 112 and 114 of the Copyright Act is eligible for statutory licensing, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, SoundExchange's acceptance of a service's payment does not express or imply any acknowledgment that a service is in compliance with the requirements of the statutory licenses.

SoundExchange does not acknowledge receipt of Statements of Account. If you wish to receive confirmation of delivery, please mail this form by Certified Mail, return receipt requested.

# STATEMENT OF ACCOUNT FOR AN ELIGIBLE SMALL COMMERCIAL WEBCASTER SIMULCASTER $-2005\,$



# STATEMENT OF ACCOUNT FOR AN ELIGIBLE SMALL COMMERCIAL WEBCASTER SIMULCASTER PURSUANT TO SMALL WEBCASTER SETTLEMENT ACT OF 2002

All PAYMENTS and STATEMENTS OF ACCOUNT must be submitted to:

SoundExchange<sup>1</sup>
ATTN: Royalty Administration
1330 Connecticut Avenue, N.W.
Suite 330
Washington, D.C. 20036

FOR THE PERIOD: Any month during the Period January - December 2005

STATUTORY LICENSEE:	
URL:	

# I. "GROSS REVENUES" AND "EXPENSES" INFORMATION:

Please provide your "Gross Revenues2" and "Expenses3" for each month during 2005:

	Month	Gross Revenues	Expenses
1	January	\$	\$
2	February	s	\$
3	March	\$	\$
4	April	\$	S

<sup>&</sup>lt;sup>1</sup> Please contact SoundExchange at 202.828.0120 for its Federal Tax Identification Number.

Fed. Reg. 78510, 78513. http://www.copyright.gov/fedreg/2002/67fr78510.pdf.

3 "Expenses" has the meaning set forth in Section 8(g) of the Rates and Terms. 67 Fed. Reg. 78510, 78513. http://www.copyright.gov/fedreg/2002/67fr78510.pdf.

<sup>&</sup>lt;sup>2</sup> "Gross Revenues" has the meaning set forth in Section 8(h) of Appendix A (the "Rates and Terms") to the Notice of Agreement published by the Copyright Office in the Federal Register on December 24, 2002. 67 Fed. Reg. 78510, 78513. http://www.copyright.gov/fedreg/2002/67fr78510.pdf.

· · · · · ·			
5	May	\$	\$
6	June	\$	\$
7	July	\$	<u> </u>
8	August	\$	\$
9	September	\$	<u> </u>
10	October	\$	. \$
11	November	\$	\$
12	December	\$	\$
13	Add lines 1 – 12	\$	\$
n.	CALCULATIO	ONS	

Α.	Gross Revenues	Liability:
----	----------------	------------

(14)	Enter total Gross Revenues from line 13	\$ (14)
(15)	If the amount in line 14 is greater than \$250,000, proceed to line 18 and do NOT complete line 16. If not, proceed to line 16.	
(16)	Multiply the amount in line (14) by 10% (.10). This is your Gross Revenue liability if your Gross Revenues were equal to or less than \$250,000:	\$ (16)
(17)	Subtract \$250,000 from line 14	\$ (17)
(18)	Multiply the amount in line 17 by 12% (.12)	\$ (18)
(19)	Add \$2,500 to line 18. This is your Gross Revenue Liability if your Gross Revenues were greater than \$250,000	\$ (19)

.

(20)	Enter the greater of line 16 or 19	\$(20)
	B. Expenses Liability:	
(21)	Enter total Expenses from line 13(b)	\$(21)
(22)	Multiply line 21 by 7% (.07). This is your Expenses Liability	\$(22)
	C. Annual Liability:	
(23)	Enter greater of line 20 or line 22.	\$(23)
(24)	Annual Minimum Fee Due. Enter \$2,000 if you had gross revenues during 2004 of not more than \$50,000 and expect gross revenues of less than \$50,000 during 2005. Otherwise, enter \$5,000.	\$(24)
(25)	Enter the greater of line 23 or 24.	\$(25)
(26)	Enter amounts previously paid for 2005. If no amounts paid, enter -0	\$(26)
(27)	Subtract line 26 from line 25. This is the	\$ (27)

# [REMAINDER OF PAGE INTENTIONALLY BLANK]

# STATEMENT OF ACCOUNT FOR AN ELIGIBLE SMALL COMMERCIAL WEBCASTER SIMULCASTER $-2005\,$

# CERTIFICATION

I, the undersigned owner or agent of the Licensee, or officer or partner, if the Licensee is a corporation or partnership, have examined this Statement of Account and hereby certify that the information provided herein is accurate and that I am authorized to sign this Statement of account on behalf of the Eligible Small Webcaster identified above.

Signature:	
Name:	
Γitle:	
Address:	
City, State Zip:	
relephone Number:	w
E-mail Address:	
Date:	

SoundExchange does not make determinations as to whether each of the many services that rely on the statutory licenses under Sections 112 and 114 of the Copyright Act is eligible for statutory licensing, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, SoundExchange's acceptance of a service's payment does not express or imply any acknowledgment that a service is in compliance with the requirements of the statutory licenses.

Send your PAYMENT and STATEMENT OF ACCOUNT to:

soundexchange

SoundExchange, Inc. Attn: Royalty Administration 1330 Connecticut Avenue, N.W. Suite 330 Washington, D.C. 20036

Call SoundExchange at (202) 828-0120 for its Federal Tax Identification Number.

FOR THE PERIOD:	JANUARY - DECEMBER, 2005
ENTITY / SERVICE NAME:	
URL;	

USE THIS STATEMENT OF ACCOUNT IF YOU HAVE PREVIOUSLY ELECTED TO PAY ROYALTIES FOR THE SERVICE AND PERIOD NOTED ABOVE ON A PERCENTAGE OF REVENUE BASIS.

THE ELECTION OF A METHOD TO CALCULATE LIABILITY MUST BE MADE ON THE NOTICE OF ELECTION FOR A NEW SUBSCRIPTION SERVICE FOR THE 1998-2004 PERIOD, LOCATED AT http://soundexchange.com/licensee/documents/Notice\_of\_Election\_NewSubscription\_1998-2004.pdf

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#### IMPORTANT NOTICE TO STATUTORY LICENSEES:

The regulation permitting services to pay royalties on a percentage of revenue basis is very complicated. Services are advised to review carefully the regulation for this rate option, particularly the definition of "Subscription Services Revenue," to ensure that they are properly calculating their liability. The relevant regulations are set forth in the Appendix attached at the end of this Statement of Account for ease of reference.

In order to be eligible for this Percentage of Subscription Service Revenues Option, a Licensee may not engage in pricing practices whereby the Subscription Service is offered to subscribers on a 'loss leader' basis or whereby the price of the Subscription Service is materially subsidized by payments made by the subscribers for other products or services.

If you do not qualify to pay royalties on a percentage of revenue basis, then you <u>must</u> pay royalties on a Per Performance or Aggregate Tuning Hour basis.

SECTION I.

PERCENTAGE OF SUBSCRIPTION SERVICE REVENUES OPTION

#### A. Calculation of Per Subscriber Minimum

Please enter the number of Subscribers <sup>1</sup> for each month of the Period. Year to date information is required in order to determine whether payments in excess of the annual minimum fee are required

2

		Subscribers
1	January	
2	February	
3	March	
4	April	
5	Мау	
6	June	
7	July	
8	August	

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# ${\tt STATEMENT\ OF\ ACCOUNT\ FOR\ A\ NEW\ SUBSCRIPTION\ SERVICE\ ELECTING\ PERCENTAGE\ OF\ REVENUE\ OPTION\ -2005}$

		Subscribers	
9	September		9
0	October		10
1	November		
2	December		11
3	Add lines 1 – 12.		12
			13
4	Multiply Line 13 by 27 cents (\$0.27). This is your Per Subscriber Minimum Before Adjustment.		
		s.	14

# B. Calculation of Subscription Services Revenue

Please enter the relevant revenues for each month of the Period.

		January (column a)	February (column b)	March (column c)	April (column d)	May (column e)	June (column f)	<del>-</del>
15	Subscription fees 2							
16	Advertising <sup>3</sup>	\$	\$	\$	\$	\$	\$	15
		\$	\$	\$	\$	\$	\$	16
17	Revenue Sharing //Commissions 4	\$	s	\ \$	\$	\$	\$	17
18	Data fees 5		<del>  •</del>					1
	.5	\$	\$	\$	\$	\$	\$	18
19	Bad debts recovered <sup>6</sup>	s	\$	\$	\$	\$	\$	19
20	For each column, add lines 15 thru 19.	\$	\$	\$	\$	\$	\$	20

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		July (column g)	August (column h)	September (column i)	October (column j)	November (column k)	December (column I)	
21	Subscription							
00	A.L. 17.1	\$	\$	\$	\$	\$	\$	_ 2
22	Advertising							
		\$	<b> </b> \$	<b> </b> \$	\$	\$	\$	2
23	Revenue Sharing/Commissions	\$	\$	\$	\$	\$	\$	
24	Data fees	-	Ψ	Ψ		<b>*</b>	<del>"</del>	┨.
		\$	\$	\$	\$	\$	   \$	
25	Bad debts recovered							٦
		\$	\$	\$	\$	\$	\$	] 2
26	For each column, add lines 20 thru 25.							
		\$	\$	s	\$	\$	<b> </b> \$	12

<sup>&</sup>quot;Subscribers" means each person who subscribes to the Subscription Service for all or any part of the month or to whom the Subscription Service otherwise is delivered by a Licensee without a fee (e.g., during a free trial period).

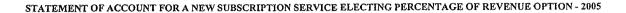
<sup>&</sup>lt;sup>2</sup>For a complete definition of this element of Subscription Services Revenue, <u>see</u> 37 C.F.R. § 262.2(m)(1)

<sup>&</sup>lt;sup>3</sup>For a complete definition of this element of Subscription Services Revenue, <u>see</u> 37 C.F.R. § 262.2(m)(2)

<sup>&</sup>lt;sup>4</sup>For a complete definition of this element of Subscription Services Revenue, see 37 C.F.R. § 262.2(m)(3)

<sup>&</sup>lt;sup>5</sup>For a complete definition of this element of Subscription Services Revenue, <u>see</u> 37 C.F.R. § 262.2(m)(4)

<sup>&</sup>lt;sup>6</sup>For a complete definition of this element of Subscription Services Revenue, see 37 C.F.R. § 262.2(m)(5)



27 Add lines 15(a) thru 15(f) and lines 21(g) thru 21(l). This is the total subscription fees revenue.

- 28 Add lines 16(a) thru 16(f) and lines 22(g) thru 22(l). This is the total Advertising revenue.
- 29 Add lines 17(a) thru 17(f) and lines 23(g) thru 23(l). This is the total Revenue Sharing/Commissions revenue.
- 30 Add lines 18(a) thru 18(f) and lines 24(g) thru 24(l). This is the total Data fees revenue.
- 31 Add lines 19(a) thru 19(f) and lines 25(g) thru 25(l). This is the total Bad debts recovered revenue.
- 32 Add lines 27 31
- 33 Multiply Line 32 by 10.9% (.109). This is your Percentage of Subscription Services Revenue Liability Before Adjustment.
- 34 Enter the greater of Line 14 or 33. This is your Percentage of Subscription Services liability if there is no adjustment for direct licensed content.

YTD Totals	
\$	27
\$	28
\$	29
\$	30
\$	31
\$	32
\$	33
\$	34

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## C. Adjustment for Direct Licensed Content

A service seeking to take an adjustment for direct licensed content <u>must</u> complete this section; provided, however, that this option is not available for a Subscription Service where:

- (A) a particular computer software product or other access device must be purchased for a separate fee from the Service as a condition of receiving transmissions of sound recordings through the Subscription Service, and the licensee chooses not to include sales of such software product or other device to subscribers as part of Subscription Service Revenues in accordance with section 37 C.F.R. § 262.2(m)(3), or
- (B) the consideration paid or given to receive the Subscription Service also entitles the subscriber to receive or have access to material, products or services other than the Subscription Service (for example, as in the case of a 'bundled service' consisting of access to the Subscription Service and also access to the Internet in general).

35	January
36	February
37	March
38	April
39	May
40	June
41	July
42	August
43	September

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Total Performances <sup>7</sup> (column a)	Total Direct Licensed Performances (column b)	
		3
		3
		3
		3
		3
		4
		4
		4
		Ι΄

		Total Performances <sup>7</sup> (column a)	Total Direct Licensed Performances (column b)	
44	October			44
45	November		<del></del>	45
46	December			46
47	Add lines 35 – 46.			47
48 49	Subtract Line 47(b) from Line 47(a) Divide Line 48 by line 47(a). This is the fraction to be used for adjusting the Percentage of Subscription Services Revenue liability for direct licensed content, if applicable. Enter "100%" if you are <u>not</u> taking any adjustments for direct licensed content.		%	48
50	Multiply Line 34 by line 49. This is your adjusted Percentage of Subscription Services Revenue liability.		\$	50

# SECTION II.

## **ANNUAL LIABILITY**

51	The Annual Minimum Fee Liability for any service electing to pay royalties on a percentage of revenue basis is		$\neg$
	\$5,000. <sup>8</sup>	\$5,000.00	5
52	Enter the greater of Line 50 or 51. This is your statutory liability for the Period.	\$	
53	Enter amounts previously paid to SoundExchange for the Period. Do not include in this amount any payments made during 2005 for any prior year.	\$	
54	Subtract Line 53 from Line 52. THIS IS THE AMOUNT THAT MUST BE PAID TO SOUNDEXCHANGE FOR THE PERIOD.	\$	

<sup>&</sup>quot;Performance" has the meaning set forth in 69 Fed, Reg. 5693, 5696 (Feb. 6, 2004) (to be codified at 37 C.F.R. § 262.2)

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<sup>&</sup>lt;sup>8</sup>See 69 Fed. Reg. at 5698 (to be codified at 37 C.F.R. § 262.3(d)(2)).



# **CERTIFICATION PAGE**

I, the undersigned owner or agent of the Licensee, or officer or partner, if the Licensee is a corporation or partnership, have examined this Statement of Account and hereby certify that the information provided herein is accurate and that I am authorized to sign this Statement of Account on behalf of the Statutory Licensee identified above.

Signature:	
Name:	
E-mail Address:	
Address:	
City, State, Zip:	
Telephone Number:	
Date:	
Sections 112 and 114 of the Copyright Act is full compliance with all applicable requirem	ons as to whether each of the many services that rely on the statutory licenses under seligible for statutory licensing, nor does it continuously verify that such services are in ents. Accordingly, SoundExchange's acceptance of a service's payment does not express is in compliance with the requirements of the statutory licenses.
SoundExchange does not acknowledge rec mail this form by Certified Mail, return recei	eipt of Statements of Account. If you wish to receive confirmation of delivery, please pt requested.
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#### **APPENDIX**

#### 37 C.F.R. § 262.2 Definitions

For purposes of this part, the following definitions shall apply:

\* \* \*

- (m) Subscription Service Revenues shall mean all monies and other consideration paid or payable, including the fair market value of non-cash or in-kind consideration paid or payable by third parties, from the operation of a Subscription Service, as comprised of the following:
- (1) Subscription fees and other monies and consideration paid for access to the Subscription Service by or on behalf of subscribers receiving within the United States transmissions made as part of the Subscription Service;
- (2) Monies and other consideration (including without limitation customer acquisition fees) from audio or visual advertising, promotions, sponsorships, time or space exclusively or predominantly targeted to subscribers of the Subscription Service, whether
- (i) On or through the Subscription Service media player, or on pages accessible only by subscribers or that are predominantly targeted to subscribers, or
  - (ii) In e-mails addressed exclusively or predominantly to subscribers of the Subscription Service, or
- (iii) Delivered exclusively or predominantly to subscribers of the Subscription Service in some other manner, in each case less advertising agency commissions (not to exceed 15% of those monies and other consideration) actually paid to a recognized advertising agency not owned or controlled by Licensee;
- (3) Monies and other consideration (including without limitation the proceeds of any revenue-sharing or commission arrangements with any fulfillment company or other third party, and any charge for shipping or handling) from the sale of any product or service directly through the Subscription Service media player or through pages or advertisements accessible only by subscribers or that are predominantly targeted to subscribers (but not pages or advertisements that are not predominantly targeted to subscribers), less
- (i) Monies and other consideration from the sale of phonorecords and digital phonorecord deliveries of sound recordings,



- (ii) The Licensee's actual, out-of-pocket cost to purchase for resale the products or services (except phonorecords and digital phonorecord deliveries of sound recordings) from third parties, or in the case of products produced or services provided by the Licensee, the Licensee's actual cost to produce the product or provide the service (but not more than the fair market wholesale value of the product or service), and
- (iii) Sales and use taxes, shipping, and credit card and fulfillment service fees actually paid to unrelated third parties; provided that:
- (A) The fact that a transaction is consummated on a different page than the page/location where a potential customer responds to a "buy button" or other purchase opportunity for a product or service advertised directly through such player, pages or advertisements shall not render such purchase outside the scope of Subscription Service Revenues hereunder, and
- (B) Monies and other consideration paid by or on behalf of subscribers for software or any other access device owned by Licensee (or any subsidiary or other affillate of the Licensee, but excluding, for the avoidance of doubt, any entity that sells a third-party product, whether or not bearing the Licensee's brand) to access the Licensee's Subscription Service shall not be deemed part of Subscription Service Revenues, unless such software or access device is required as a condition to access the Subscription Service and either is purchased by a subscriber contemporaneously with or after subscribing or has no independent function other than to access the Subscription Service;
- (4) Monies and other consideration for the use or exploitation of data specifically and separately concerning subscribers or the Subscription Service, but not monies and other consideration for the use or exploitation of data wherein information concerning subscribers or the Subscription Service is commingled with and not separated or distinguished from data that predominantly concern nonsubscribers or other services; and
- (5) Bad debts recovered with respect to paragraphs (m)(1) through (4) of this section; provided that the Subscription Service shall be permitted to deduct bad debts actually written off during a reporting period.

37 C.F.R. § 262.3 Royalty fees for public performances of sound recordings and for ephemeral recordings\* \*\*\* (a)(2) Subscription Services. For their operation of Subscription Services, Licensees other than Business Establishment Services shall, at their election as provided in paragraph (b) of this section, pay at one of the following rates:



(i) Per Performance Option. \$0.000762 (0.0762 cents) per Performance for all digital audio transmissions, except that 4% of Performances shall bear no royalty to approximate the number of partial Performances of nominal duration made by a Licensee due to, for example, technical interruptions, the closing down of a media player or channel switching; Provided that this provision is not intended to imply that permitting users of a service to "skip" a recording is or is not permitted under 17 U.S.C. 114(d)(2). For the avoidance of doubt, this 4% exclusion shall apply to all Licensees electing this payment option irrespective of the Licensee's actual experience in respect of partial performances.

#### (ii) Aggregate Tuning Hour Option.—

- (A) Non-Music Programming. \$0.000762 (0,0762 cents) per Aggregate Tuning Hour for programming reasonably classified as news, talk, sports or business programming.
- (B) Broadcast Simulcasts, \$0.0088 (0.88 cents) per Aggregate Tuning Hour for Broadcast Simulcast programming not reasonably classified as news, talk, sports or business programming.
- (C) Other Programming, \$0.0117 (1.17 cents) per Aggregate Tuning Hour for programming other than Broadcast Simulcast programming and programming reasonably classified as news, talk, sports or business programming.
- (iii) Percentage of Subscription Service Revenues Option. 10.9% of Subscription Service Revenues, but in no event less than 27 cents per month for each person who subscribes to the Subscription Service for all or any part of the month or to whom the Subscription Service otherwise is delivered by Licensee without a fee (e.g., during a free trial period), subject to the following reduction associated with the transmission of directly licensed sound recordings (if applicable). For any given payment period, the fee due from Licensee shall be the amount calculated under the formula described in the immediately preceding sentence multiplied by the following fraction: the total number of Performances (as defined under § 262.2(j), which excludes directly licensed sound recordings) made by the Subscription Service during the period in question, divided by the total number of digital audio transmissions of sound recordings made by the Subscription Service during the period in question (inclusive of Performances and equivalent transmissions of directly licensed sound recordings). Any Licensee paying on such basis shall report to the Designated Agent on its statements of account the pertinent music use information upon which such reduction has been calculated. This option shall not be available to a Subscription Service where—
- (A) A particular computer software product or other access device must be purchased for a separate fee from the Licensee as a condition of receiving transmissions of sound recordings through the Subscription Service, and the Licensee chooses not to include sales of such software product or other device to subscribers as part of Subscription Service Revenues in accordance with § 262.2(m)(3), or
- (B) The consideration paid or given to receive the Subscription Service also entitles the subscriber to receive or have access to material, products or services other than the Subscription Service (for example, as in the case of a "bundled service" consisting of access to the Subscription Service and also access to the Internet in general). In all events, in order to be eligible for this payment option, a Licensee may not engage in pricing practices whereby the Subscription Service is offered to subscribers on a "loss leader" basis or whereby the price of the Subscription Service is materially subsidized by payments made by the subscribers for other products or services.

#### SHORT FORM STATEMENT OF ACCOUNT FOR A NEW SUBSCRIPTION SERVICE ELECTING PERCENT OF REVENUE - 2005

Send your PAYMENT and STATEMENT OF ACCOUNT to:

soundexchange

SoundExchange, Inc. Attn: Royalty Administration 1330 Connecticut Avenue, N.W. Suite 330 Washington, D.C. 20036

Call SoundExchange at (202)828-0120 for its Federal Tax Identification Number.

FOR THE 2005 CALENDAI	R MONTH OF (the "Month"):	(enter name	of month)
ENTITY / SERVICE NAME:			
JRL:			

THIS SHORT FORM STATEMENT OF ACCOUNT IS TO BE USED ONLY BY THOSE LICENSEES THAT HAVE PREVIOUSLY EXCEEDED AND PAID THE ANNUAL MINIMUM FEE FOR 2005.

## IMPORTANT NOTICE TO STATUTORY LICENSEES:

The regulation permitting services to pay royalties on a percentage of revenue basis is very complicated. Services are advised to review carefully the regulation for this rate option, particularly the definition of "Subscription Services Revenue," to ensure that they are properly calculating their liability. The relevant regulations are set forth in the Appendix attached at the end of this Statement of Account for ease of reference.

In order to be eligible for this Percentage of Subscription Service Revenues Option, a Licensee may not engage in pricing practices whereby the Subscription Service is offered to subscribers on a 'loss leader' basis or whereby the price of the Subscription Service is materially subsidized by payments made by the subscribers for other products or services.

If you do not qualify to pay royalties on a percentage of revenue basis, then you  $\underline{must}$  pay royalties on a Per Performance or Aggregate Tuning Hour basis.

#### SHORT FORM STATEMENT OF ACCOUNT FOR A NEW SUBSCRIPTION SERVICE ELECTING PERCENT OF REVENUE - 2005

## SECTION I. PERCENTAGE OF SUBSCRIPTION SERVICE REVENUES OPTION

## A. Calculation of Per Subscriber Minimum

Please enter the number of Subscribers<sup>1</sup> for the current Month.

- 1 Current Month
- 2 Line 1 multiplied by 27 cents (\$0.27) (calculated).
  This is your Per Subscriber Minimum Before
  Adjustment.

Subscribers	 ]
	1
	Ì
\$	2

## B. Calculation of Subscription Services Revenue

Please enter the relevant revenues for the current Month.

- 3 Subscription fees<sup>2</sup>
- 4 Advertising<sup>3</sup>
- 5 Revenue Sharing /Commissions<sup>4</sup>
- 6 Data lees<sup>5</sup>
- 7 Bad debts recovered<sup>6</sup>
- 8 Total Subscription Services Revenue (calculated)
- Line 8 multiplied by 10.9% (.109) (calculated). This is your Percentage of Subscription Services Revenue Liability Before Adjustment.
- 10 Greater of line 2 or 9 (calculated). This is your Percentage of Subscription Services liability if there is no adjustment for direct licensed content.

\$	•	3
\$	-	4
\$	-	5
\$	_	6
\$		7
\$		8
		ľ
s		9
	_	110

<sup>\*</sup>Subscribers means each person who subscribes to the Subscription Service for all or any part of the month or to whom the Subscription Service otherwise is delivered by a Licensee without a fee (e.g., during a free trial period).

<sup>&</sup>lt;sup>2</sup>For a complete definition of this element of Subscription Services Revenue, <u>see</u> 37 C.F.R. § 262.2(m)(1).

<sup>&</sup>lt;sup>3</sup>For a complete definition of this element of Subscription Services Revenue, <u>see</u> 37 C.F.R. § 262.2(m)(2).

<sup>\*</sup>For a complete definition of this element of Subscription Services Revenue, see 37 C.F.R. § 262.2(m)(3).

<sup>&</sup>lt;sup>5</sup>For a complete definition of this element of Subscription Services Revenue, see 37 C.F.R. § 262.2(m)(4).

For a complete definition of this element of Subscription Services Revenue, see 37 C.F.R. § 262.2(m)(5).

# C. Adjustment for Direct Licensed Content A service seeking to take an adjustment for direct licensed content <u>must</u> complete this section; provided, however, that this option is not available for a Subscription Service where: (A) a particular computer software product or other access device must be purchased for a separate fee from the Service as a condition of receiving transmissions of sound recordings through the Subscription Service, and the licensee chooses not to include sales of such software product or other device to subscribers as part of Subscription Service Revenues in accordance with section 37 C.F.R. § 262.2(m)(3), or (B) the consideration paid or given to receive the Subscription Service also entitles the subscriber to receive or have access to material, products or services other than the Subscription Service (for example, as in the case of a 'bundled service' consisting of access to the Subscription Service and also access to the Internet in general). 11 Place an "X" in Line 35 if you are taking an adjustment for direct licensed content ====== Total Performances (i.e., Total Performances7, i.e. Transmissions of Sound number in column a PLUS Total Direct Recordings for Which a License is Required. icensed Performances® (column a) (column b) 12 Current Month 13 Cell 12(a) divided by cell 12(b). This is the fraction to be used for adjusting the Percentage of Subscription Services Revenue liability for direct licensed content, if applicable. If you are not taking an adjustment for 12 direct licensed content, then 100% (calculated) 100.0000% 13 14 Line 10 multiplied by line 13. This is your adjusted (or unadjusted) Percentage of Subscription Services Revenue liability. (calculated). THIS IS THE AMOUNT THAT MUST BE PAID TO SOUNDEXCHANGE FOR THE MONTH, PAYMENT IS DUE 45 DAYS AFTER THE END OF THE MONTH.

<sup>1</sup>See Appendix for definition of *Total Performances* 

\*Direct Licensed Performances means each instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one Listener) where the service has previously obtained a license from the Copyright Owner of such sound recording.

\*Seg. 69 Fed. Reg. at 5698 (to be codified at 37 C.F.R. § 282.3(d)(2)).

#### CERTIFICATION PAGE

I, the undersigned owner or agent of the Licensee, or officer or partner, if the Licensee is a corporation or partnership, have examined this Statement of Account and hereby certify that the information provided herein is accurate and that I am authorized to sign this Statement of Account on behalf of the Statutory Licensee identified above.

Signature:		
Name:		
vanc.		
E-mail Address:		
Address:	<del></del>	
City, State, Zip:		
Telephone Number:		
releptione (ventioe).		
Date:		

SoundExchange does not make determinations as to whether each of the many services that rely on the statutory licenses under Sections 112 and 114 of the Copyright Act is eligible for statutory licensing, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, SoundExchange's acceptance of a service's payment does not express or imply any acknowledgment that a service is in compliance with the requirements of the statutory licenses.

SoundExchange does not acknowledge receipt of Statements of Account. If you wish to receive confirmation of delivery, please mail this form by Certified Mail, return receipt requested.

#### APPENDIX

#### 37 C.F.R. § 262.2 Definitions.

For purposes of this part, the following definitions shall apply:

- (i) Total Performences means each instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one Listener) but excluding the following:
- (1) A performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);
- (2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and
- (3) An incidental performance that both:
- (i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and
- (ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme sound.
- (m) Subscription Service Revenues shall mean all monies and other consideration paid or payable, including the lair market value of non-cash or in-kind consideration paid or payable by third parties, from the operation of a Subscription Service, as comprised of the following:
- (1) Subscription fees and other monies and consideration paid for access to the Subscription Service by or on behalf of subscribers receiving within the United States transmissions made as part of the Subscription Service;
- (2) Monies and other consideration (including without limitation customer acquisition lees) trom audio or visual advertising, promotions, sponsorships, time or space exclusively or predominantly targeted to subscribers of the Subscription Service, whether
- (i) On or through the Subscription Service media player, or on pages accessible only by subscribers or that are predominantly targeted to subscribers, or
  - (ii) In e-mails addressed exclusively or predominantly to subscribers of the Subscription Service, or
- (iii) Defivered exclusively or predominantly to subscribers of the Subscription Service in some other manner, in each case less advertising agency commissions (not to exceed 15% of those mories and other consideration) actually paid to a recognized advertising agency not owned or controlled by Licensee;
- (3) Monies and other consideration (including without limitation the proceeds of any revenue-sharing or commission arrangements with any fulfillment company or other third party, and any charge for shipping or handling) from the sale of any product or service directly through the Subscription Service media player or through pages or advertisements accessible only by subscribers or that are predominantly targeted to subscribers (but not pages or advertisements that are not predominantly targeted to subscribers), less
- (i) Monies and other consideration from the sale of phonorecords and digital phonorecord deliveries of sound recordings,
- (ii) The Licensee's actual, out-of-pocket cost to purchase for resale the products or services (except phonorecords and digital phonorecord deliveries of sound recordings) from third parties, or in the case of products produced or services provided by the Licensee, the Licensee's actual cost to produce the product or provide the service (but not more than the tall market wholecale value of the product or sorvice), and
- (iii) Sales and use taxes, shipping, and credit card and fulfillment service fees actually paid to unrelated third parties; provided that:
  - (A) The fact that a transaction is consummated on a different page than the page/location where

#### SHORT FORM STATEMENT OF ACCOUNT FOR A NEW SUBSCRIPTION SERVICE ELECTING PERCENT OF REVENUE - 2005

a potential customer responds to a "buy button" or other purchase opportunity for a product or service advertised directly through such player, pages or advertisements shall not render such purchase outside the scope of Subscription Service Revenues hereunder, and

- (B) Monies and other consideration paid by or on behalf of subscribers for software or any other access device owned by Licensee (or any subsidiary or other affiliate of the Licensee, but excluding, for the avoidance of doubt, any entity that sells a third-party product, whether or not bearing the Licensee's brand) to access the Licensee's Subscription Service shall not be deemed and Subscription Service Revenues, unless such software or access device is required as a condition to access the Subscription Service and either is purchased by a subscriber contemporaneously with or after subscribing or has no independent function other than to access the Subscription Service.
- (4) Monies and other consideration for the use or exploitation of data specifically and separately concerning subscribers or the Subscription Service, but not monies and other consideration for the use or exploitation of data wherein Information concerning subscribers or the Subscription Service is comminigled with and not separated or distinguished from data that predominantly concern nonsubscribers or other services; and
- (5) Bad debts recovered with respect to paragraphs (m)(1) through (4) of this section; provided that the Subscription Service shall be permitted to deduct bad debts actually written off during a reporting period.

37 C.F.R. § 262.3 Royalty fees for public performances of sound recordings and for ephemeral recordings

(a)(2) Subscription Services. For their operation of Subscription Services, Licensees other than Business Establishment Services shall, at their election as provided in paragraph (b) of this section, pay at one of the following rates:

- (i) Per Performance Option. \$0.000762 (0.0762 cents) per Performance for all digital audio transmissions, except that 4% of Performances shall bear no royalty to approximate the number of partial Performances of nominal duration made by a Licensee due to, for example, technical interruptions, the closing down of a media player or channel switching; Provided that this provision is not intended to imply that permitting users of a service to "skip" a recording is or is not permitted under 17 U.S.C. § 114(d)(2). For the avoidance of doubt, this 4% exclusion shall apply to all Licensee's electing this payment option irrespective of the Licensee's actual experience in respect of partial performances.
- (ii) Aggregate Tuning Hour Option.—

  (A) Non-Music Programming, \$0.000762 (0.0762 cents) per Aggregate Tuning Hour for programming reasonably classified as news, talk, sports or business programming.
- (B) Broadcast Simulcasts. \$0.0088 (0.88 cents) per Aggregate Tuning Hour for Broadcast Simulcast programming not reasonably classified as news, talk, sports or business programming
- (C) Other Programming, \$0.0117 (1.17 cents) per Aggregate Tuning Hour for programming other than Broadcast Simulcast programming and programming reasonably classified as news, talk, sports or business programming.
- (iii) Percentage of Subscription Service Revenues Option. 10.9% of Subscription Service Revenues, but in no event less (iii) Percentage of Subscripton Service Revenues Option. 10,9% of Subscripton Service Revenues, but in no event less than 27 cents per month for each person who subscribes to the Subscripton Service for all or any part of the month or to whom the Subscription Service otherwise is delivered by Licensee without a fee (e.g., during a free trial period), subject to the following reduction associated with the transmission of directly licensed sound recordings (it applicable). For any given payment period, the fee due from Licensee shall be the amount calculated under the formula described in the immediately preceding sentence multiplied by the following fraction: the total number of Performances (as defined under § 262.2(i), which excludes directly licensed sound recordings) made by the Subscription Service during the period in question, divided by the total number of digital audio transmissions of sound recordings made by the Subscription Service during the period in question (inclusive of Performances and equivalent transmissions of directly licensed sound recordings). Any Licensee paying on such basis shall report to the Designated Agent on its statements of account the pertinent music use information upon which such reduction has been calculated. This option shall not be available to a Subscription Service where-
- (A) A particular computer software product or other access device must be purchased for a separate tee from the Licensee as a condition of receiving transmissions of sound recordings through the Subscription Service, and the Licensee chooses not to include sales of such software product or other device to subscribers as part of Subscription Service Revenues in accordance with § 262.2(m)(3), or
- (B) The consideration paid or given to receive the Subscription Service also entitles the subscriber to receive or have access to material, products or services other than the Subscription Service (for example, as in the case of a "bundled service" consisting of access to the Subscription Service and also access to the Internet in general). In all events, in order to be eligible for this payment option, a Licensee may not engage in pricing practices whereby the Subscription Service is offered to subscribers on a "loss leader" basis or whereby the price of the Subscription Service is materially subsidized by payments made by the subscribers for other products or services.



# NOTICE OF ELECTION TO PAY ROYALTIES AS AN ELIGIBLE SMALL WEBCASTER

For All or Any Portion of Period January 1, 2005 – December 31, 2005 (must be filed by no later than the first date on which royalty payments are due for the relevant period)

#### I. ELECTION

In accordance with the authority granted to SoundExchange under the Small Webcaster Settlement Act of 2002 (the "SWSA"), Pub. L. No. 107-321, 116 Stat. 2780, and pursuant to Sec. 6 of The Copyright Royalty and Distribution Reform Act of 2004, the transmission service named below hereby files with SoundExchange its notice of election to pay royalties and comply with the terms adopted pursuant to the SWSA and published in the Federal Register on December 24, 2002, 67 Fed. Reg. 78510 (the "Eligible Small Webcaster Rates and Terms") for the making of ephemeral phonorecords or digital audio transmissions of sound recordings, or both, under the statutory licenses set forth in sections 112(e) and 114(d)(2) of title 17 of the United States Code, respectively, for the period commencing on January 1, 2005, or the date of the first digital audio transmission of a sound recording under statutory license after such date, and ending on December 31, 2005.

#### II. BINDING NATURE OF ELECTION

The service acknowledges that this election to pay royalties in accordance with the Eligible Small Webcaster Rates and Terms is in lieu of any different rates and terms that may be available to such service. Upon the filing of this notice of election, and for so long as the service qualifies as an "eligible small webcaster," as such term is defined in Section 8 of the Eligible Small Webcaster Rates and Terms, the service acknowledges that it cannot opt out of these Rates and Terms in order to elect different rates arrived at by a CARP except in the limited circumstance set forth in Section 1(d) of the Eligible Small Webcaster Rates and Terms. See <a href="http://www.soundexchange.com/Rates">http://www.soundexchange.com/Rates</a> Terms.pdf.

# III. INITIAL STATEMENT OF QUALIFICATION TO MAKE PAYMENTS AS ELIGIBLE SMALL WEBCASTER IN 2005.

The service hereby states that it and its "affiliates" "gross revenues," plus "third party participation revenues" and revenues from the operation of a new subscription service, have not exceeded \$1,250,000 in any calendar year prior to 2005, and that the service expects to be an "eligible small webcaster" during 2005. "Affiliate," "gross revenues," "third party participation revenues" and "eligible small webcaster" shall have the meanings set forth in Section 8 of the Eligible Small Webcaster Rates and Terms. The

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Last Updated 12/22/2004

service acknowledges that the filing of this notice of election does not guarantee the service the right to pay statutory royalties under the Eligible Small Webcaster Rates and Terms if and when the service no longer qualifies as an eligible small webcaster.

# IV. DATE OF FIRST DIGITAL AUDIO TRANSMISSION UNDER STATUTORY LICENSE

	creby states that the date it first made a digital audio transmission of order the statutory license set forth in 17 U.S.C. § 114(d)(2) after
December 31, 2002 is	(enter date).
V. IDENTIFYIN	IG INFORMATION FOR ELIGIBLE SMALL WEBCASTER
Please provide	the requested information for each item.
1. Name of service	
2. Mailing address	
3. City/State/Zip	
o. Onyround, 21p	Note: A post office box is acceptable only if it is the only address that can be used in that geographic location.
4. Telephone number	
5. Fax number	
6. Website address of	service http://
7. Contact person for	questions
8. Telephone number	for contact person
9. E-mail address for o	

#### VI. CERTIFICATION

The undersigned hereby states, under penalty of perjury, that the information provided in this notice of election is accurate and that the undersigned is authorized to act on behalf of the service electing to pay royalties as an eligible small webcaster. The undersigned further acknowledges that he/she has reviewed the Eligible Small Webcaster Rates and Terms and that the service agrees to be bound by the same and the provisions of the statutory licenses and any applicable provisions of regulations adopted thereunder.

Officer or au	thorized representative of eligible small webcaster
Signature	
Name	
Title	
Date	

#### VII. DELIVERY

A completed notice of election must be delivered to the following address: SoundExchange, ATTN: Royalty Administration, 1330 Connecticut Avenue, N.W., Suite 330, Washington, D.C. 20036.



# NOTICE OF ELECTION FOR ELIGIBLE NONSUBSCRIPTION TRANSMISSION SERVICE 2005 LICENSE PERIOD

An entity operating an eligible Nonsubscription Transmission Service must elect how it shall calculate its liability during the period January 1, 2005 to December 31, 2005 (the "2005 License Period") by no later than **January 31, 2005**. Where an entity has not previously provided a nonsubscription transmission service, it may make its election by no later than thirty (30) days after the service first makes a digital audio transmission of a sound recording under the statutory license set forth in 17 U.S.C. § 114.

Each such election must be on this form. The election, once made, is fixed for the entire 2005 License Period.

An entity operating a Nonsubscription Service may pay royalties based upon the number of Performances<sup>1</sup> of sound recordings transmitted, or its Aggregate Tuning Hours.<sup>2</sup> Under governing regulations, a service that fails to make a timely election is required to pay royalties on a per Performance basis;<sup>3</sup> provided, however, if the entity previously filed a timely Notice of Election with SoundExchange to calculate royalties on a basis other than a per Performance basis for all or any portion of a period ending December 31, 2004, then such prior election shall remain in effect for the 2005 License Period unless a subsequent election is made on this Notice of Election.

Put an "X" next to the method by which you choose to calculate your royalty liability for the 2005 License Period. Please put an "X" in only one box:

Per Performance		Aggregate Tuning Hours	
-----------------	--	------------------------	--

#### [REMAINDER OF PAGE INTENTIONALLY BLANK]

Last Revised, 12/21/04

<sup>1 &</sup>quot;Performance" has the meaning set forth in 69 Fed. Reg. 5693, 5696 (Feb. 6, 2004) (to be codified at 37 C.F.R. § 262.2).

<sup>&</sup>lt;sup>2</sup> "Aggregate Tuning Hours" has the meaning set forth in 69 Fed. Reg. at 5695-96 (to be codified at 37 C.F.R. § 262.2).

<sup>&</sup>lt;sup>3</sup> See 69 Fed. Reg. at 5698 (to be codified at 37 C.F.R. § 262.3 (b)).

# IDENTIFYING INFORMATION FOR ENTITY OPERATING AN ELIGIBLE NONSUBSCRIPTION TRANSMISSION SERVICE

Please provide the requested information for each item. 1. Name of entity/service: 2. Mailing address: 3. City/State/Zip: Note: A post office box is acceptable only if it is the only address that can be used in that geographic location. 4. Telephone number: 5. Fax number: 6. Website address of service: http://\_\_\_\_\_ 7. Contact person for questions: 8. Telephone number for contact person: 9. E-mail address for contact person: CERTIFICATION The undersigned hereby states that he or she is authorized to make the election set forth above. Signature: Name: Title:

#### DELIVERY

A completed Notice of Election must be delivered to:

Date:

SoundExchange
ATTN: Royalty Administration
1330 Connecticut Avenue, N.W., Suite 330
Washington, D.C. 20036

SoundExchange does not acknowledge receipt of documents. If you wish to receive notice of delivery, please mail this form by Certified Mail, return receipt requested.

CE SERV TRANSMIS	PEATURED ARTIST	SOUND RECORDING TITLE	ALBUM TITLE	MARKETING LABEL	ORMANCES	AGGREGATE_TUNING_H	CHANNEL OR PROGRAM NAME PLAY FREQUE
CASTER A CASTER A ICASTER A	THE MAMAS & THE PAPAS	DEDICATED TO THE ONE I LOVE	16 OF THEIR GREATEST HITS	MCA	15		
BCASTER A	THE MAMAS & THE PAPAS	CALIFORNIA DREAMIN'	16 OF THEIR GREATEST HITS 16 OF THEIR GREATEST HITS	MCA	36		<del></del>
CASTER A	THE MAMAS & THE PAPAS THE MAMAS & THE PAPAS	I CALL YOUR NAME	16 OF THEIR GREATEST HITS	MCA	1		-
BCASTER A	THE MAMAS & THE PAPAS	DREAM A LITTLE DREAM OF ME	16 OF THEIR GREATEST HITS	MCA	27		
BCASTER A	THE MAMAS & THE PAPAS THE MAMAS & THE PAPAS THE MAMAS & THE PAPAS	GO WHERE YOU WANNA GO	16 OF THEIR GREATEST HITS	MCA			
BCASTER A	THE MAMAS & THE PAPAS	I SAW HER AGAIN LAST NIGHT	16 OF THEIR GREATEST HITS	MCA MCA	10	-	
BCASTER A	THE MAMAS & THE PAPAS	WORDS OF LOVE	16 OF THEIR GREATEST HITS 18 OF THEIR GREATEST HITS	MCA	21		-
BCASTER A	THE MAMAS & THE PAPAS THE MAMAS & THE PAPAS	TWELVE-THIRTY CREEQUE ALLEY	16 OF THEIR GREATEST HITS	MCA	111	1	
BCASTER A	VAN HALEN	JUMP	1984		20		
BCASTER A	IVAN HALEN	PANAMA	1964	WARNER BROTHERS WARNER BROTHERS	31		
BCASTER A	VAN HALEN	HOT FOR TEACHER	1984	WARNER BROTHERS	32	-	
RCASTER A	VAN HALEN	ITLL WAIT	1984	WARNER BROTHERS WARNER BROTHERS	29	-	
BCASTER A	PRINCE	1999	1999	WARNER BROTHERS	1		-
BCASTER A	PRINCE	DEURIOUS	1999	WARNER BROTHERS WARNER BROTHERS	5	1	
BGASTER A	PRINCE	LET'S PRETEND WERE MARRIED	1999	WARNER BROTHERS	2		
BCASTER A	PRINCE	D. M. S. R.	1999	WARNER BROTHERS WARNER BROTHERS	1		
BCASTER A	GENESIS	HOME BY THE SEA	GENESIS	ATLANTIC	2		
BCASTER A	GARTH BROOKS	STANDING OUTSIDE THE FIRE	IN PIECES	CAPITOL	10	-	
BCASTER A	THE DOORS	WAKE UP	SGT. PEPPER'S LONELY HEARTS	ELEKTRAASYLUM	20	-	
CASTER A	THE BEATLES	WHEN I'M SIXTY-FOUR	CLUB BAND	EMI	44		
BCASTER A	JETHRO TULL	LIVING IN THE PAST	THE BEST OF JETHRO TULL	CAPITOL	5		
BCASTER A	MADONNA	LIKE A VIRGIN	THE BEST OF JETHRO TULL THE IMMACULATE COLLECTION	MAVERICK	11		
BCASTER A	THE BEATLES	CAN'T BUY ME LOVE	A HARD DAY'S NIGHT	APPLE	13	-	
			ura ex	ADDI F		100000000000000000000000000000000000000	
BCASTER A	THE BEATLES	YOU'VE GOT TO HIDE YOUR LOVE AWAY	REVOLYER	APPLE	10/		
BCASTER A	THE BEATLES ALANIS MORESSETTE	YOU OUGHTA KNOW	JAGGED LITTLE PILL	MAVERICK	3		
BCASTER A	NINE INCH NAILS	REPTILE	THE DOWNWARD SPIRAL	INTERSCOPE	3		
DO-SILVE P	TOM PETTY & THE						
BCASTER A	HEARTBREAKERS	RUNNIN' DOWN A DREAM	GREATEST HITS	MCA	17		
BCASTER A	ALICE IN CHAINS	INO EXCUSES	JAR OF FUES	SONY	45		
BCASTER A	SARAH MCLACHLAN	ICE CREAM	FUMBLING TOWARDS ECSTASY	ARISTA	11		
BCASTER A	WYNONNA	SHE IS HIS ONLY NEED	WYNONNA JUDD	MCA	111	-	
DOLETTO I	BIG HEAD TODO & THE	BITTERSWEET	SISTER SWEETLY	WARNER BROTHERS	5	The second second	
BCASTER A	ELVIS PRESLEY	HOUND DOG	SINGS LEIBER & STOLLER	RCA	11		
BCASTER A	TORI AMOS	HOUND DOG SILENT ALL THESE YEARS	SINGS LEIBER & STOLLER LITTLE EARTHQUAKES	ATLANTIC	10		
BCASTER A	DEF LEPPARD	DIE HARD THE HUNTER	PYROMANIA	POLYGRAM			
BCASTER A	NIRVANA	LOVE BUZZ	BLEACH	SUB POP	5		
BCASTER A	OPERATION IVY	I GOT NO	DERATION IVY BIG BACKYARD BEAT SHOW	LOOKOUT RECORDS	2	-	
EBCASTER A	BR549 THE CAVE 4	HURTIN SONG BIKINI CRASH	BIKINI CRASHI	MUSICK	-		
BCASTER A	CARJACKER	REMOTE	LAND OF RAVE	HYPNOTIC	3	-	
to saien	- Paranten	The state of the s	GIVE UP THE FUNK. THE BEST OF	111111111111111111111111111111111111111			
EBCASTER A	PARLIAMENT	FLASH LIGHT	PARLIAMENT	POLYGRAM	6		
BCASTER A	CHARLES MINGUS	MOM (MONK, DUKE & ME)	MINGUS	CANDID	16		
			TALES FROM THE BROTHERS GIBB .				
BCASTER A	BEE GEES	MASSACHUSETTS	A HISTORY IN SONG	POLYGRAM KAMA SUTRA BUDDAH	A	-	
DCASTED A	STEVE GOODMAN	ELECTION YEAR RAG	(CDZ)	RECORDS	2		
BCASTER A	STEVE GOODWAY	ECCUTION TEAM TONS	3 YEARS,5 MONTHS AND 2 DAYS IN	11.00			
BCASTER A	ARRESTED DEVELOPMENT	PEOPLE EVERYDAY	THE LIFE OF	CAPITOL	67		
			3 YEARS, 5 MONTHS AND 2 DAYS IN				
BCASTER A	ARRESTED DEVELOPMENT	TENNESSEE WHY CAN'T THIS BE LOVE	THE LIFE OF	CAPITOL BROTHERS	20		
BCASTER A	VAN HALEN VAN HALEN	DREAMS	5150	WARNER BROTHERS	1	-	
BCASTER A	VAN HALEN	LOVE WALKS IN	5150	WARNER BROTHERS WARNER BROTHERS	8		
BCASTER A	SUZANNE VEGA	IN LIVERPOOL	99.9 F	A&M RECORDS	7		
BCASTER A	SUZANNE VEGA	BLOOD SINGS	99.9 F	ALM RECORDS	6		
BCASTER A	SUZANNE VEGA	FAT MAN & DANCING GIRL	99.9 F	MAM RECORDS	1	-	
BCASTER IA	SUZANNE VEGA	BAD WISDOM	99.9 F	ALM RECORDS	10		
BCASTER A	SUZANNÉ VĚGA STĚELY DAN	SONG OF SAND HEY NINETEEN	99.9 F	A&M RECORDS	-	+	
BCASTER A	STEELY DAN	DO IT AGAIN	A DECADE OF STEELY DAN A DECADE OF STEELY DAN A DECADE OF STEELY DAN	MCA MCA	13		
BCASTER A	STEELY DAN	PEG	A DECADE OF STEELY DAN	MCA	42		
RCASTER A	STEELY DAN	RIKKI DON'T LOSE THAT NUMBER	A DECADE OF STEELY DAN	MCA	3		
BCASTER A	STEELY DAN	REELING IN THE YEARS	A DECADE OF STEELY DAN	MCA	13		
BCASTER A	INEIL YOUNG	ITELL ME WHY	AFTER THE GOLD RUSH	WARNER BROTHERS	3		
RCASTER A	MEIL YOUNG	ONLY LOVE CAN BREAK YOUR HEART	AFTER THE GOLD RUSH	WARNER BROTHERS	1		
BCASTER A	NEIL YOUNG	OH, LONESOME ME DON'T LET IT BRING YOU DOWN	AFTER THE GOLD RUSH AFTER THE GOLD RUSH	WARNER BROTHERS	14	1	
BLANGIER A	NEIL TOONS	WHEN YOU DANCE YOU CAN REALLY					
BCASTER A	NEIL YOUNG	LOVE	AFTER THE GOLD RUSH AFTER THE GOLD RUSH	WARNER BROTHERS	5		
BCASTER A	NEIL YOUNG	CRIPPLE CREEK FERRY	AFTER THE GOLD RUSH	WARNER BROTHERS	3		
	BOB SEGER & THE SILVER						
BCASTER A	BULLET BAND	YOU'LL ACCOMP'NY ME	AGAINST THE WIND	CAPITOL		-	
DCASTED .	BOB SEGER & THE SILVER	HER STRUT	AGAINST THE WIND	CAPITOL			
BCASTER A	BOB SEGER & THE SILVER	Tananai -	The Mind of the Mind	1	1		

ASTER A	SSION_CAT	SOUND RECORDING TITLE	SRC	ALBUM TITLE		ORMANCES	AGGREGATE_TUNING_HO	CHANNEL OR PROGRAM NAME	PLAY FREQUENC
ASTER A	WAILING SOULS MATTHEW SWEET	YOU AIN'T LEAVING DEVIL WITH THE GREEN EYES		ALL OVER THE WORLD ALTERED BEAST	SONY VOLCANO	4			
ASTER A	GRATEFUL DEAD	BOX OF RAIN	_	AMERICAN BEAUTY	ARISTA	3			
ASTER A	GRATEFUL DEAD	PRIEND OF THE DEVIL		AMERICAN REALITY	ARISTA	5			
STER A	GRATEFUL DEAD	SUGAR MAGNOLIA		AMERICAN BEAUTY	ARUSTA	1			
STER A	GRATEFUL DEAD GRATEFUL DEAD	OPERATOR		AMERICAN BEAUTY	ARISTA	5			
STER A		CANDYMAN		AMERICAN BEAUTY	ARISTA	1			
ASTER A	GRATEFUL DEAD JOHN MELLENCAMP	RIPPLE	-	AMERICAN BEAUTY	ARISTA	3			
STER A	JOHN MELLENCAMP	HURTS SO GOOD HAND TO HOLD ON TO		AMERICAN FOOL	POLYGRAM	17	-		
STER A	VERUCA SALT	SEETHER	-	AMERICAN FOOL AMERICAN THIGHS	POLYGRAM GEFFEN	21			
STER A	BREAD	MAKE IT WITH YOU	-	ANTHOLOGY	ELEKTRAASYLUM	6			
ASTER A	BREAD	IT DON'T MATTER TO ME		ANTHOLOGY	ELEKTRAVASYLUM	4			
STER A	BREAD	(F		ANTHOLOGY	ELEKTRAVASYLUM	8			
STER A	BREAD	BABY FM-A WANT YOU		ANTHOLOGY	ELEKTRAVASYLUM	4			
STER A	BREAD	EVERYTHING I OWN		ANTHOLOGY	ELEKTRAASYLUM	4			
STER A	BREAD	DIARY		ANTHOLOGY	ELEKTRAJASYLUM	7			
STER A	BREAD	LOST WITHOUT YOUR LOVE		ANTHOLOGY	ELEKTRWASYLUM	6			
STER A	GUNS N' ROSES	WELCOME TO THE JUNGLE		APPETITE FOR DESTRUCTION	GEFFEN	86			
STER A	GUNS N' ROSES GUNS N' ROSES	MR. BROWNSTONE		APPETITE FOR DESTRUCTION	GEFFEN	45			
STER A	GUNS N' ROSES	PARADISE CITY		APPETITE FOR DESTRUCTION APPETITE FOR DESTRUCTION	GEFFEN GEFFEN	14			-
STER A	GUNS N' ROSES	MY MICHELLE	-	APPETITE FOR DESTRUCTION	GEFFEN	36			
STER A	GUNS N' ROSES	SWEET CHILD O' MINE		APPETITE FOR DESTRUCTION	GEFFEN	91			
STER A	GUNS N' ROSES GUNS N' ROSES	ANYTHING GOES		APPETITE FOR DESTRUCTION APPETITE FOR DESTRUCTION	GEFFEN	10			
STER A	GUNS N' ROSES	ROCKET QUEEN		APPETITE FOR DESTRUCTION	GEFFEN	9			
STER A	ROXY MUSIC	MORE THAN THIS		AVALON	VIRGIN	23			
STER A	ROXY MUSIC	THE SPACE BETWEEN		AVALON	VIRGIN	7			
STER A	ROXY MUSIC	INDIA		AVALON	VIRGIN	14			
STER A	ROXY MUSIC	WHILE MY HEART IS STILL BEATING		AVALON AVALON	VIRGIN VIRGIN	1			
STER A	ROXY MUSIC	THE MAIN THING		AVALON	VIRGIN	8			
STER A	ROXY MUSIC	TAKE A CHANCE WITH ME		AVALON	VIRGIN	14			
STER A	STEVE WINWOOD	HIGHER LOVE		BACK IN THE HIGH LIFE	POLYGRAM	8			-
STER A	STEVE WINWOOD STEVE WINWOOD	TAKE IT AS IT COMES		BACK IN THE HIGH LIFE	POLYGRAM	4			
STER A	STEVE WINWOOD	FREEDOM OVERSPILL		BACK IN THE HIGH LIFE	POLYGRAM	1			
STER A	STEVE WINWOOD	BACK IN THE HIGH LIFE AGAIN THE FINER THINGS		BACK IN THE HIGH LIFE	POLYGRAM	36			
STER A	STEVE WINWOOD	THE FINER THINGS		BACK IN THE HIGH LIFE	POLYGRAM	1			
STER A	STEVE WINWOOD	SPLIT DECISION		BACK IN THE HIGH LIFE	POLYGRAM	1			
STER A	STEVE WINWOOD MADONNA	MY LOVE'S LEAVIN'	-	BACK IN THE HIGH LIFE	POLYGRAM	6			
STER A	MADONNA	SECRET	-	BEDTIME STORIES BEDTIME STORIES	MAVERICK MAVERICK	25	and the second second	The second secon	
STER A	MADONNA	TO RATHER BE YOUR LOVER		BEDTIME STORIES	MAVERICK	20			
STER A	MADONNA	DON'T STOP		BEDTIME STORIES	MAVERICK	25			
STER A	MADONNA	INSIDE OF ME		BEDTIME STORIES	MAVERICK	25		Contract to the second second	-
STER A	MADONNA	HUMAN NATURE		BEDTIME STORIES	MAVERICK	29			
STER A	MADONNA	PORBIDDEN LOVE		BEDTIME STORIES	MAVERICK	24			
STER A	MADONNA	LOVE TRIED TO WELCOME ME		BEDTIME STORIES	MAVERICK	20			
STER A	MADONNA	SANCTUARY		BEDTIME STORIES	MAVERICK	25			
STER A	MADONNA MADONNA	BEDTIME STORY		BEDTIME STORIES	MAVERICK	25			
STED A	FRANK SINATRA	TAKE A BOW STRANGERS IN THE NIGHT		BEDTIME STORIES	MAVERICK	48			
STER A	FRANK SINATRA	SUMMER WIND	-	BEST SELECTION BEST SELECTION	CAPITOL	4			
STER A	FRANK SINATRA	ALL OR NOTHING AT ALL		BEST SELECTION	CAPITOL	-			
STER A	FRANK SINATRA	CALL ME		BEST SELECTION	CAPITOL	2			
STER A	FRANK SINATRA	YOU'RE DRIVING ME CRAZY	10010	BEST SELECTION	CAPITOL	2			
STER A	FRANK SINATRA	DOWNTOWN		BEST SELECTION	CAPITOL	5			
STER A	FRANK SINATRA	MRS. ROBINSON IF YOU GO AWAY		BEST SELECTION	CAPITOL	5			
	FRANK SINATRA	IF YOU GO AWAY		BEST SELECTION	CAPITOL	2			
STER A	FRANK SINATRA	FOR ONCE IN MY LIFE		BEST SELECTION	CAPITOL	2			-
STER A	FRANK SINATRA	A DAY IN THE LIFE OF FOOL WATCH WHAT HAPPENS	-	BEST SELECTION	CAPITOL	4			
STER A	FRANK SINATRA	DIDN'T WE	-	BEST SELECTION BEST SELECTION	CAPITOL	-			
STER A	FRANK SINATRA	HALLELWAH I LOVE HER SO		BEST SELECTION	CAPITOL	2			
STER A	FRANK SINATRA	YESTERDAY		BEST SELECTION	CAPITOL	3			
STER A	FRANK SINATRA	ALL MY TOMORROWS		BEST SELECTION	CAPITOL	3			
STER A	FRANK SINATRA	MYWAY		BEST SELECTION	CAPITOL	1			
STER A	4 NON BLONDES	WHAT'S UP		BIGGER, BETTER, FASTER, MORE!	INTERSCOPE	33			-
	RED HOT CHILI PEPPERS	BREAKING THE GIRL		BLOOD SUGAR SEX MAGIK	WARNER BROTHERS	11			
STER A	RED HOT CHILI PEPPERS RED HOT CHILI PEPPERS	SUCK MY KISS		BLOOD SUGAR SEX MAGIK	WARNER BROTHERS	7			
STER A	EN VOGUE	UNDER THE BRIDGE	-	BLOOD SUGAR SEX MAGIK	WARNER BROTHERS	41			
STER A	EN VOGUE	PART OF ME		BORN TO SING BORN TO SING	ATLANTIC ATLANTIC	10			
STER A	MELISSA ETHERIDGE	NO SOUVENIRS		BRAVE AND CRAZY	POLYGRAM				
STER A	MELISSA ETHERIDGE	THE ANGELS		BRAVE AND CRAZY	POLYGRAM	1			
STER A	MELISSA ETHERIDGE MELISSA ETHERIDGE	YOU CAN SLEEP WHILE I DRIVE		BRAVE AND CRAZY	POLYGRAM	A			
STER A	MELISSA ETHERIDGE	MY BACK DOOR		BRAVE AND CRAZY	POLYGRAM	4			
STER A	MELISSA ETHERIDGE COLOR ME BADD	ROYAL STATION 4/16		BRAVE AND CRAZY	POLYGRAM	3			
STER A	COLOR ME BADO	I WANNA SEX YOU UP		C. M. B.	GIANT RECORDS	25			
STER A	COLOR ME BADO	ALL 4 LOVE		C. M. B.	GIANT RECORDS	4			
STER A	COLOR ME BADD	DON'T DREAM IT'S OVER		C. M. B.	GIANT RECORDS	4			
STER A	CROWDED HOUSE CROWDED HOUSE	SOMETHING SO STRONG		CROWDED HOUSE CROWDED HOUSE	CAPITOL	17			

ME OF SERV TRANSMIS	SION_CAT	SOUND RECORDING TITLE	ISRC 56	ALBUM TITLE	MARKETING LABEL	ACTUAL_TOTAL_PERF	AGGREGATE_TUNING_HO	CHANNEL OR PROGRAM NAME	DIAY EDECUTES
EBCASTER A	DIRE STRAITS	SOUTHBOUND AGAIN	no NO /SEG	DIRE STRAITS	WARNER BROTHERS	2	UKS	CHANNEL OR PROGRAM NAME	PLAT PREQUENCY
BCASTER A	DIRE STRAITS	SULTANS OF SWING		DIRE STRAITS	WARNER BROTHERS	33			
BCASTER A	DIRE STRAITS	WLD WEST END		DIRE STRAITS	WARNER BROTHERS	2			
SCASTER A	FRANK SINATRA FRANK SINATRA	THE LADY IS A TRAMP WHAT NOW MY LOVE		DUETS DUETS	CAPITOL	3			
BCASTER A	FRANK SINATRA	IVE GOT A CRUSH ON YOU	-	DUETS	CAPITOL	13			
BCASTER A	FRANK SINATRA	SUMMER WIND		DUETS	CAPITOL	4			
BCASTER A	FRANK SINATRA	COME RAIN OR COME SHINE		DUETS	CAPITOL	1			
EBCASTER A	FRANK SINATRA	THEY CAN'T TAKE THAT AWAY FROM ME	1000	DUETE	CARTO				
EBCASTER A	FRANK SINATRA	YOU MAKE ME FEEL SO YOUNG		DUETS	CAPITOL	2			
					GI TINGE				
BCASTER A	FRANK SINATRA	GUESS I'LL HANG MY TEARS OUT TO DRY		DUETS	CAPITOL	3			
BCASTER A BCASTER A	FRANK SINATRA	IVE FOR THE WORLD ON A STRING		DUETS	CAPITOL	3			
BCASTER A	FRANK SINATRA	WITCHCRAFT I'VE GOT YOU UNDER MY SKIN	-	DUETS	CAPITOL	9			
BCASTER A	FRANK SINATRA	ALL THE WAY/ ONE FOR MY BABY		DUETS	CAPITOL	4			
BCASTER A	STEEL PULSE	STEPPIN OUT	-	EARTH CRISIS	ELEKTRAASYLUM	2			
BCASTER A	STEEL PULSE	TIGHTROPE		EARTH CRISIS	ELEKTRALASYLUM	1			
BCASTER A	STEEL PULSE	THRONE OF GOLD		EARTH CRISIS	ELEKTRAASYLUM	1			
BCASTER A BCASTER A	STEEL PULSE	ROLLER SKATES BODYGUARD	-	EARTH CRISIS EARTH CRISIS	ELEKTRAJASYLUM ELEKTRAJASYLUM	1			
BCASTER A	STEEL PULSE	GRAB EDUCATION	-	EARTH CRISIS	ELEKTRAASYLUM	12		-	
BCASTER A	STEEL PULSE	WILD GOOSE CHASE	-	EARTH CRISIS	ELEKTRAASYLUM	3			
BCASTER A	THE CULT	PEACE DOG		ELECTRIC	BEGGARS BANQUET	4			
BCASTER A	THE CULT	LIL DEAL		ELECTRIC	BEGGARS BANQUET	7			
BCASTER A BCASTER A	THE CULT	LOVE REMOVAL MACHINE IN THE AIR TONIGHT	-	ELECTRIC	BEGGARS BANQUET	11			
BCASTER A	PHIL COLLINS PAULA ARDUL	OPPOSITES ATTRACT	-	FACE VALUE FOREVER YOUR GIRL	ATLANTIC VIRGIN	111			
BCASTER A	PAULA ABDUL	FOREVER YOUR GIRL	-	FOREVER YOUR GIRL	VIRGIN	6			
BCASTER A	PAULA ABDUL	STRAIGHT UP		FOREVER YOUR GIRL	VIRGIN	16			
BCASTER A	PAULA ABDUL	COLD HEARTED		FOREVER YOUR GIRL	VIRGIN	6			
				FOR UNLAWFUL CARNAL					
BCASTER A	VAN HALEN	TOP OF THE WORLD		KNOWLEDGE	WARNER BROTHERS	9			
BCASTER A	GENESIS GENESIS	THAT'S ALL TAKING IT ALL TOO HARD		GENESIS GENESIS	ATLANTIC ATLANTIC	4			
BCASTER A	MATTHEW SWEET	NOTHING LASTS	-	GIRLFRIEND	VOLCANO	1			
BCASTER A	SMASHING PUMPKINS	RHINOCEROS		GISH	VIRGIN	3			
BCASTER A	SMASHING PUMPKINS	DAYDREAM		GISH	VIRGIN	7			
BCASTER A	LYNYRD SKYNYRD	DOWN SOUTH JUKIN'		GOLD & PLATINUM	MCA	7			
BCASTER A BCASTER A	LYNYRD SKYNYRD	WHAT'S YOUR NAME		GOLD & PLATINUM	MCA	21	-		
BCASTER A	LYNYRD SKYNYRD	GIMME BACK MY BULLETS SWEET HOME ALABAMA	-	GOLD & PLATINUM GOLD & PLATINUM	MCA MCA	14			
EBCASTER A	ELTON JOHN	CANDLE IN THE WIND	-	GOODBYE YELLOW BRICK ROAD	ISLAND	120	-		
BCASTER A	ELTON JOHN	GOODBYE YELLOW BRICK ROAD		GOODBYE YELLOW BRICK ROAD	ISLAND	12	-		
BCASTER A	ELTON JOHN	ALL THE GIRLS LOVE ALICE EARLY MORNING RAIN		GOODBYE YELLOW BRICK ROAD	ISLAND	3			
BCASTER A	GORDON LIGHTFOOT			GORD'S GOLD	WARNER BROTHERS	3			
BCASTER A	GORDON LIGHTFOOT	SUNDOWN		GORD'S GOLD	WARNER BROTHERS	6			
BCASTER A	GORDON LIGHTFOOT BEE GEES	IF YOU COULD READ MY MIND MORE THAN A WOMAN		GORD'S GOLD GREATEST (CD2)	WARNER BROTHERS	6			
BCASTER A	AEROSMITH	DREAM ON	-	GREATEST HITS	GEFFEN	77			
BCASTER A	AEROSMITH	SAME OLD SONG AND DANCE	-	GREATEST HITS	GEFFEN	19			
BCASTER A	AEROSMITH	SWEET EMOTION (SINGLE EDIT)		GREATEST HITS	GEFFEN	28			
BCASTER A	AEROSMITH	WALK THIS WAY		GREATEST HITS	GEFFEN	94			
BCASTER A	AEROSMITH AEROSMITH	LAST CHILD		GREATEST HITS	GEFFEN	11			
BCASTER A	AEROSMITH AEROSMITH	BACK IN THE SADDLE COME TOGETHER	-	GREATEST HITS GREATEST HITS	GEFFEN	27			
BCASTER A	DEVO	THROUGH BEING COOL	-	GREATEST HITS	WARNER BROTHERS	25			
BCASTER A	DEVO	BIG MESS		GREATEST HITS	WARNER BROTHERS	2			
BCASTER A	DEVO	THAT'S GOOD		GREATEST HITS	WARNER BROTHERS	8			- CONTRACTOR OF THE PARTY OF TH
BCASTER A	DEVO	BEAUTIFUL WORLD		GREATEST HITS	WARNER BROTHERS	4			
BCASTER A	DEVO DEVO	(I CAN'T GET NO) SATISFACTION	-	GREATEST HITS	WARNER BROTHERS	3			
BCASTER A	DEVO	GIRL U WANT	-	GREATEST HITS GREATEST HITS	WARNER BROTHERS	30			
BCASTER A	DEVO	FREEDOM OF CHOICE	-	GREATEST HITS	WARNER BROTHERS	13			
BCASTER A	ELTON JOHN	YOUR SONG		GREATEST HITS	ISLAND	2			
BCASTER A	ELTON JOHN	DANIEL		GREATEST HITS	ISLAND	7			
BCASTER A	ELTON JOHN	HONKY CAT		GREATEST HITS	ISLAND	4			
BUASIEK A	ELTON JOHN	GOODBYE YELLOW BRICK ROAD SATURDAY NIGHT'S ALRIGHT FOR		GREATEST HITS	ISLAND	4			
BCASTER A	ELTON JOHN	FIGHTING	1000	GREATEST HITS	ISLAND				1 1 1 1 1 1 1
BCASTER A	ELTON JOHN	BENNIE AND THE JETS	-	GREATEST HITS	ISLAND	13			
BCASTER A	ELTON JOHN	BORDER SONG		GREATEST HITS	ISLAND	27			
CASTER A	FI FETWOOD MAC	RHIANNON		GREATEST HITS	WEA INTERNATIONAL	25			
BCASTER A	FLEETWOOD MAC	DONT STOP		GREATEST HITS	WEA INTERNATIONAL	3			
BCASTER A BCASTER A	FLEETWOOD MAC	GO YOUR OWN WAY		GREATEST HITS	WEA INTERNATIONAL	13			
BCASTER A	FLEETWOOD MAC	EVERYWHERE	-	GREATEST HITS GREATEST HITS	WEA INTERNATIONAL	3			
BCASTER A	FLEETWOOD MAC	GYPSY	-	GREATEST HITS	WEA INTERNATIONAL	13			
BCASTER A	FLEETWOOD MAC	YOU MAKE LOVING FUN		GREATEST HITS	WEA INTERNATIONAL	3			
BCASTER A	FLEETWOOD MAC	DREAMS		GREATEST HITS	WEA INTERNATIONAL	12			
BCASTER A	FLEETWOOD MAC	SAY YOU LOVE ME		GREATEST HITS	WEA INTERNATIONAL	3			
BCASTER A		LITTLE LIES		GREATEST HITS	WEA INTERNATIONAL				

AME OF SERV TRANSMISS	ELDE CAY	MATERIAL STREET, STREE	LENGTH I		Factor Copyrigate Value Service	TACTILAL TOTAL PEDE	AGGREGATE TUNING HO	Palestyle types and some agent	WILLIAM CHICAGOSTA CON
E EGORY	FEATURED ARTIST	SOUND RECORDING TITLE	RC	ALBUM TITLE	MARKETING LABEL	ORMANCES	URS	CHANNEL OR PROGRAM NAME	PLAY FREQUENCY
EBCASTER A EBCASTER A	THE CARS	JUST WHAT I NEEDED		GREATEST HITS	ELEKTRAASYLUM	3			
EBCASTER A	THE CARS	GOOD TIMES ROLL		GREATEST HITS	ELEKTRWASYLUM	3			
EBCASTER A EBCASTER A	THE CARS	ORIVE		GREATEST HITS	ELEKTRAVASYLUM	9			
EBCASTER A	THE CARS	MY BEST FRIEND'S GIRL	-	GREATEST HITS	ELEKTRAASYLUM	8			
EBCASTER A	THE CARS THE FOUR SEASONS	SHAKE IT UP DECEMBER 1963 (DANCE VERSION)	_	GREATEST HITS GREATEST HITS	ELEKTRA/ASYLUM RHINO RECORDS	10			
EBCASTER A	ELTON JOHN	THE BITCH IS BACK	-	GREATEST HITS VOLUME 2	ISLAND	2			
EBCASTER A	ELTON JOHN	LUCY IN THE SKY WITH DIAMONDS	-	GREATEST HITS VOLUME 2	ISLAND	3			
	100.00.00	SORRY SEEMS TO BE THE HARDEST	-						
EBCASTER A	ELTON JOHN	WORD	11.03	GREATEST HITS VOLUME 2	ISLAND	4			
		DON'T GO BREAKING MY HEART (FEAT.	To Part of		30 2 3 B B B B B B B B B B B B B B B B B B				
EBCASTER A	ELTON JOHN	KIKI DEE)	-	GREATEST HITS VOLUME 2	ISLAND	3			
EBCASTER A EBCASTER A	ELTON JOHN	SOMEONE SAVED MY LIFE TONIGHT		GREATEST HITS VOLUME 2	ISLAND	5			
	ELTON JOHN	PHILADELPHIA FREEDOM	-	GREATEST HITS VOLUME 2	ISLAND	4			
BCASTER A	ELTON JOHN	PINBALL WIZARD		GREATEST HITS VOLUME 2	ISLAND	3			
		I GUESS THAT'S WHY THEY CALL IT THE							
BCASTER A	ELTON JOHN	LITTLE JEANNIE	-	GREATEST HITS VOLUME III GREATEST HITS VOLUME III	ISLAND	4		-	
BCASTER A	ELTON JOHN	ISAD SONGS (SAY SO MUCH)	-	GREATEST HITS VOLUME III	ISLAND	4			
BCASTER A		I'M STILL STANDING	1	GREATEST HITS VOLUME III	ISLAND	:	-		
BCASTER A	ELTON JOHN ELTON JOHN	EMPTY GARDEN (HEY HEY JOHNNY)	-	GREATEST HITS VOLUME III	ISLAND	2			
BCASTER A	ELTON JOHN	BLUE EYES		GREATEST HITS VOLUME III	ISLAND	6			
BCASTER A	NEIL YOUNG	UNKNOWN LEGEND	-	HARVEST MOON	WARNER BROTHERS	0			
BCASTER IA	NEIL YOUNG	FROM HANK TO HENDRIX		HARVEST MOON	WARNER BROTHERS	12			
BCASTER A	NEIL YOUNG	YOU AND ME		HARVEST MOON	WARNER BROTHERS	11			
BCASTER A BCASTER A	NEIL YOUNG	HARVEST MOON		HARVEST MOON	WARNER BROTHERS	11			
BCASTER A	NEIL YOUNG	WAR OF MAN		HARVEST MOON	WARNER BROTHERS	2			
BCASTER A	HEART	THESE DREAMS		HEART	CAPITOL	1			
BCASTER A BCASTER A	BELINDA CARLISLE	HEAVEN IS A PLACE ON EARTH	100	HEAVEN ON EARTH	MCA	7			
BCASTER A	BELINDA CARLISLE	CIRCLE IN THE SAND		HEAVEN ON EARTH	MCA	4			
BCASTER A	BELINDA CARLISLE	I GET WEAK		HEAVEN ON EARTH	MCA	5			
BCASTER A	PHIL COLLINS	I DON'T CARE ANYMORE		HELLO, I MUST BE GOING!	ATLANTIC	5			
BCASTER A	PHIL COLLINS	YOU CAN'T HURRY LOVE		HELLO, I MUST BE GOING!	ATLANTIC	7			
BCASTER A	AC/DC	HIGHWAY TO HELL		HIGHWAY TO HELL	SONY	22			
BCASTER A	AC/DC	GIRLS GOT RHYTHM		HIGHWAY TO HELL	SONY	22			
BCASTER A	AC/DC	WALK ALL OVER YOU		HIGHWAY TO HELL	SONY	12			
BCASTER A	AC/DC	TOUCH TOO MUCH		HIGHWAY TO HELL	SONY	3			
BCASTER A	AC/DC	SHOT DOWN IN FLAMES	-	HIGHWAY TO HELL	SONY	22			
	lui anana			PHOTOGRAPHS & MEMORIES: HIS					
EBCASTER A	JIM CROCE	BAD, BAD LEROY BROWN	-	GREATEST HITS PHOTOGRAPHS & MEMORIES: HIS	ATLANTIC	15			
EBCASTER A	JIM CROCE	OPERATOR		GREATEST HITS	ATT ANTE				
EBCASTER IA	DIM CROCE	OPERATOR	-	PHOTOGRAPHS & MEMORIES: HIS	ATLANTIC	ja .			
EBCASTER A	JIM CROCE	PHOTOGRAPHS AND MEMORIES		GREATEST HITS	ATLANTIC				The state of
LECHUTER A	JIM CHOCE	PROTOGRAFIIS AND MEMORIES	-	PHOTOGRAPHS & MEMORIES: HIS	ALDANIC	-			
EBCASTER A	JIM CROCE	TIME IN A BOTTLE		GREATEST HITS	ATLANTIC	10		The second second	The state of the s
		THE IN A BOTTLE	-	PHOTOGRAPHS & MEMORIES: HIS	ATOMIC	10	-		
EBCASTER A	JIM CROCE	NEW YORK'S NOT MY HOME		GREATEST HITS	ATLANTIC	2			
		THE TOTAL ON THE TOTAL		PHOTOGRAPHS & MEMORIES: HIS	Arbarrio	-			
EBCASTER A	JIM CROCE	WORKIN' AT THE CAR WASH BLUES		GREATEST HITS	ATLANTIC	3			
			-	PHOTOGRAPHS & MEMORIES: HIS	THE STATE OF THE S	-			
BCASTER A	JIM CROCE	I GOT A NAME		GREATEST HITS	ATLANTIC	115			
			-	PHOTOGRAPHS & MEMORIES; HIS				10/5/2010/01/01	
BCASTER A	JIM CROCE	I'LL HAVE TO SAY I LOVE YOU IN A SONG	3 4 1	GREATEST HITS	ATLANTIC	21			
				PHOTOGRAPHS & MEMORIES: HIS					
BCASTER A	JIM CROCE	YOU DON'T MESS AROUND WITH JIM		GREATEST HITS	ATLANTIC	4			
			2014	PHOTOGRAPHS & MEMORIES: HIS					
BCASTER A	JIM CROCE	LOVER'S CROSS		GREATEST HITS	ATLANTIC	2			
			-	PHOTOGRAPHS & MEMORIES: HIS					
BCASTER A	JIM CROCE	ONE LESS SET OF FOOTSTEPS		GREATEST HITS	ATLANTIC	2		Commence of the second	
BCASTER A	ELTON JOHN	MONA LISAS AND MAD HATTERS		HONKY CHATEAU	ISLAND	3			
BCASTER A	JOHN LENNON	GIVE PEACE A CHANCE		MAGINE (SOUNDTRACK)	CAPITOL	9			
BCASTER A	JOHN LENNON	IMAGINE (REHEARSAL)		MAGINE (SOUNDTRACK)	CAPITOL	10			
BCASTER A BCASTER A	JOHN LENNON	JEALOUS GUY		IMAGINE (SOUNDTRACK)	CAPITOL	15			
DCARTER A	JOHN LENNON	WOMAN		MAGINE (SOUNDTRACK)	CAPITOL	1			
BCASTER A	JOHN LENNON JOHN LENNON	BEAUTIFUL BOY		IMAGINE (SOUNDTRACK)	CAPITOL	2			
BCASTER A		(JUST LIKE) STARTING OVER	-	IMAGINE (SOUNDTRACK)	CAPITOL	19			
BCASTER A	JOHN LENNON THE ROMANTICS	TALKING IN YOUR SLEEP	-	IMAGINE (SOUNDTRACK) IN HEAT	CAPITOL	33			
	THE NOMARTIOS	AMERICAN HONKY-TONK BAR		IN DEAT	SONY	130			
RCASTER A	GARTH BROOKS	ASSOCIATION		IN PIECES	CADITO				
BCASTER A BCASTER A	GARTH BROOKS	AINT GOING DOWN	-	IN PIECES	CAPITOL	10			
BCASTER A	GARTH BROOKS	CALLIN BATON ROUGE		IN PIECES	CAPITOL	16			
BCASTER A	GENESIS	INVISIBLE TOUCH		INVISIBLE TOUCH	ATLANTIC	R			
BCASTER A BCASTER A BCASTER A BCASTER A	GENESIS	TONIGHT TONIGHT TONIGHT	-	INVISIBLE TOUCH	ATLANTIC	14			
BCASTER A	GENESIS	LAND OF CONFUSION		INVISIBLE TOUCH	ATLANTIC	4			
BCASTER A	GENESIS	IN TOO DEEP		INMSIBLE TOUCH	ATLANTIC	4			
BCASTER A BCASTER A	GENESIS	THROWING IT ALL AWAY		INVISIBLE TOUCH	ATLANTIC	4			
BCASTER IA	JANET JACKSON	THAT'S THE WAY LOVE GOES		JANET	A&M RECORDS	78			
BCASTER A BCASTER A	JANET JACKSON	iF		JANET	A&M RECORDS	14			
RCASTER IA	JANET JACKSON	BECAUSE OF LOVE		JANET	A&M RECORDS	5			
DONG ICII		AGAIN				140			
BGASTER A	JANET JACKSON			JANET	A&M RECORDS	16			
BCASTER A BCASTER A BCASTER A	JANET JACKSON JANET JACKSON INXS	ANY TIME, ANY PLACE NEW SENSATION		JANET JANET KICK	A&M RECORDS  A&M RECORDS  RHINO RECORDS	13			

NAME OF SERV TRANSMISSION CA	TIES TO THE THE PERSON NAMED IN	THE RESIDENCE OF THE PROPERTY	E TO COMPLETE MEMBERS OF MATERIAL CONTROL	T THE SECTION OF THE PARTY OF	TACTUAL TOTAL DEDE	AGGREGATE TUNING HO	Land to the state of the state	CHICAGO CONSTRUCTOR DE L'ANGE
CE EGORY WERCASTER A	FEATURED ARTIST	SOUND RECORDING TITLE ISRC	ALBUM_TITLE	MARKETING LABEL	ORMANCES	URS	CHANNEL OR PROGRAM NAME	PLAY FREQUENCY
VEBCASTER A	INXS	DEVIL INSIDE	KICK	RHINO RECORDS	10			
VERCASTED A	INXS	NEED YOU TONIGHT NEVER TEAR US APART	KICK	RHINO RECORDS	6			
VEBCASTER A	THE CURE	THE KISS	KISS ME, KISS ME, KISS ME	RHINO RECORDS	15			
VEBCASTER A	THE CURE	CATCH	KISS ME, KISS ME, KISS ME	ELEKTRAVASYLUM	6			
VEBCASTER A	THE CURE	WHY CAN'T I BE YOU?	KISS ME, KISS ME, KISS ME	ELEKTRAVASYLUM	17			
VEBCASTER IA	THE CURE	THE SNAKEPIT	KISS ME, KISS ME, KISS ME	ELEKTRWASYLUM	2			
	THE CURE	JUST LIKE HEAVEN ALL I WANT	KISS ME, KISS ME, KISS ME	ELEKTRAVASYLUM	18			
WEBCASTER A WEBCASTER A	THE CURE	LIKE COCKATOOS	KISS ME, KISS ME, KISS ME KISS ME, KISS ME, KISS ME	ELEKTRAASYLUM ELEKTRAASYLUM	6			
WEBCASTER A	THE CURE	SHIVER AND SHAKE	KISS ME, KISS ME, KISS ME	ELEKTRAASYLUM	1			
WEBCASTER A WEBCASTER A	PRETENDERS	FOREVER YOUNG	LAST OF THE INDEPENDENTS	WARNER BROTHERS	4			
	LED ZEPPELIN	WHOLE LOTTA LOVE	LED ZEPPELIN BOX SET	ATLANTIC	45			
WEBCASTER A	LED ZEPPELIN	HEY HEY WHAT CAN I DO	LED ZEPPELIN BOX SET	ATLANTIC	62			
WEBCASTER A	LED ZEPPELIN	WHITE SUMMER/ BLACK MOUNTAIN SIDE	LED ZEPPELIN BOX SET	ATLANTIC	47			
WEBCASTER A	LED ZEPPELIN	BRON-Y-AUR STOMP	LED ZEPPELIN BOX SET	ATLANTIC	26			
AVERCACTED A	LED ZEPPELIN	ROCK AND ROLL	LED ZEPPELIN BOX SET	ATLANTIC	50			
VEBCASTER A WEBCASTER A WEBCASTER A VEBCASTER A VEBCASTER A VEBCASTER A	LEO ZEPPELIN	MOBY DICK / BONZO'S MONTREUX	LED ZEPPELIN BOX SET	ATLANTIC	48			
VEBCASTER A	MADONNA	ANGEL	JLIKE A VIRGIN	MAVERICK	4			
VERCASTER A	MADONNA INXS	DRESS YOU UP WHAT YOU NEED	LIKE A VIRGIN	MAVERICK	12			
VERCASTER IA	INXS	LISTEN LIKE THIEVES	LISTEN LIKE THIEVES	AOL GOLD	19			
VEBCASTER A	INXS	KISS THE DIRT	LISTEN LIKE THIEVES	AOL GOLD	17			
VERCASTER A	INXS	THIS TIME	LISTEN LIKE THIEVES	AOL GOLD	112			
VEBCASTER A VEBCASTER A	BRUCE SPRINGSTEEN	THUNDER ROAD	LIVE/1975-85 (CD1)	SONY	5			
WEBCASTER A	BRUCE SPRINGSTEEN BRUCE SPRINGSTEEN	FIRE	LIVE/1975-85 (CD1)	SONY	2			
WEBCASTER A	THE DOORS	BECAUSE THE NIGHT SPANISH CARAVAN	LIVE/1975-85	SONY	2			
	GEORGE THOROGOOD & THE	ar odian covoron	LIVE AT THE HOLLYWOOD BOWL	ELEKTRAVASYLUM	10			
WEBCASTER A	DESTROYERS	MADISON BLUES	LIVE	CAPITOL	11			
WEBCASTER A	TONE LOC	WILD THING	LOCED AFTER DARK	RHINO RECORDS	83			
WEBCASTER A	TONE LOC	FUNKY COLD MEDINA	LOCED AFTER DARK	RHINO RECORDS	66			
WEBCASTER A WEBCASTER A	TONE LOC ELTON JOHN	CHEEBA CHEEBA TINY DANCER	LOCED AFTER DARK	RHINO RECORDS	5			
WEBCASTER A	ELTON JOHN	LEVON	MADMAN ACROSS THE WATER	ISLAND	11			
	- LETON SOME	LEVON	MADMAN ACROSS THE WATER	ISLAND	16			
WEBCASTER A	LENNY KRAVITZ	WHAT GOES AROUND COMES AROUND	MAMA SAID	VIRGIN	17			
WEBCASTER A	CHARLIE DANIELS BAND	MISSISSIPPI	MILLION MILE REFLECTIONS	SONY	3			
WEBCASTER A	THE CURE	LULLABY (EXTENDED MIX)	MIXED UP	ELEKTRAASYLUM	5			
WEBCASTER A	THE CURE	CLOSE TO ME (CLOSER MIX)	MIXED UP	ELEKTRAVASYLUM	9			
WEBCASTER A	THE CURE	FASCINATION STREET (EXTENDED MIX)	MIXED UP	EL ENTRA MARIA LIM				
WEBCASTER A WEBCASTER A	THE CURE	LOVESONG (EXTENDED MIX)	MIXED UP	ELEKTRA/ASYLUM ELEKTRA/ASYLUM	9	-		
WEBCASTER A	THE CURE	A FOREST (TREE MIX)	MIXED UP	ELEKTRWASYLUM	1			
WEBCASTER A	THE CURE DEPECHE MODE	PICTURES OF YOU (EXTENDED DUB MIX)	MIXED UP	ELEKTRAASYLUM	2			
WEBCASTER A	DEPECHE MODE	NEVER LET ME DOWN AGAIN THE THINGS YOU SAID	MUSIC FOR THE MASSES MUSIC FOR THE MASSES	WARNER BROTHERS WARNER BROTHERS	29			
WEBCASTER A								
WEBCASTER A	IDEPECHE MODE	STRANGELOVE	MUSIC FOR THE MASSES		15			
WEBCASTER A	DEPECHE MODE	STRANGELOVE LITTLE 15	MUSIC FOR THE MASSES MUSIC FOR THE MASSES	WARNER BROTHERS	82			
	DEPECHE MODE DEPECHE MODE	STRANGELOVE LITTLE 15 BEHIND THE WHEEL	MUSIC FOR THE MASSES MUSIC FOR THE MASSES MUSIC FOR THE MASSES	WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS				
WEDGASTER A	DEPECHE MODE DEPECHE MODE DEPECHE MODE	STRANGELOVE LITTLE 15 BEHIND THE WHEEL TO HAVE AND TO HOLD	MUSIC FOR THE MASSES MUSIC FOR THE MASSES MUSIC FOR THE MASSES MUSIC FOR THE MASSES	WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS	82			
WEBCASTER A	DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE	STRANGELOYE LUTTLE 15 BEHIND THE WHEEL TO HAVE AND TO HOLD NOTHING	MUSIC FOR THE MASSES	WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS	82			
WEBCASTER A WEBCASTER A WEBCASTER A	DEPECHE MODE DEPECHE MODE DEPECHE MODE	STRANGELOVE LITTLE 16 BEHIND THE WHEEL TO HAVE AND TO HOLD NOTHING PLEASURE LITTLE TREASURE	MUSIC FOR THE MASSES	WARNER BROTHERS	82 2 14 3 7			
WEBCASTER A WEBCASTER A WEBCASTER A WEBCASTER A	DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE NIRVANA NIRVANA	STRANGELOVE LUTTLE 18 SPENIND THE WHEEL TO HAVE AND TO HOLD NOTHING PLEASURE, LUTTLE TREASURE SMELLS LIKE YEEN SPIRIT	MUSIC FOR THE MASSES	WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS GEFFEN	82			
WEBCASTER A WEBCASTER A WEBCASTER A WEBCASTER A WEBCASTER A WEBCASTER A	DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE NIRVANA NIRVANA NIRVANA	STRANGELOVE LUTTLE 18 SPENIND THE WHEEL TO HAVE AND TO HOLD NOTHING PLEASURE, LUTTLE TREASURE SMELLS LIKE YEEN SPIRIT	MUSIC FOR THE MASSES MUSIC FOR	WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS GEFFEN GEFFEN GEFFEN GEFFEN	82 2 14 3 7 2 55			
WEBCASTER A VEBCASTER A VEBCASTER A VEBCASTER A VEBCASTER A VEBCASTER A	DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE NIRVANA NIRVANA NIRVANA NIRVANA	STRANGELOVE LUTTLE 18 BENIND THE WHEEL TO HAVE AND TO HOLD NOTHING PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPIRIT IN BLOOM COME AS YOU ARE BREED	MUSIC FOR THE MASSES NEVERMIND NEVERMIND NEVERMIND NEVERMIND	WARNER BROTHERS GEFFEN GEFFEN GEFFEN GEFFEN	82 2 14 3 7 2 2 555 40 27 41			
WEBCASTER A	DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE NIRVANA NIRVANA NIRVANA NIRVANA	STRANGELOVE UITTLE 18 BERIND THE WHEEL TO HAVE AND TO HOLD NOTHING PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPIRIT IN BLOOM COME AS YOU ARE BREED LITTLE	MUSIC FOR THE MASSES MUSIC FOR	WARNER BROTHERS OEFFEN GEFFEN GEFFEN GEFFEN GEFFEN GEFFEN	82 2 14 3 7 7 2 55 40 27			
WEBCASTER A	DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE NIRVANA NIRVANA NIRVANA NIRVANA NIRVANA NIRVANA	STRANGELOVE UTTLE 18 BENIND THE WHEEL TO HAVE AND TO HOLD NOTHING PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPIRIT IN BLOOM COME AS YOU ARE BREED LITHIUM POLLY	NUSIC FOR THE MASSES NEVERNINO NEVERNINO NEVERNINO NEVERNINO NEVERNINO NEVERNINO NEVERNINO NEVERNINO	WARNER BROTHERS GEFFEN GEFFEN GEFFEN GEFFEN GEFFEN GEFFEN GEFFEN	82 2 114 3 7 2 2 55 40 27 41 22 28 27			
WESCASTER A VERCASTER A	DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE NIRVANA NIRVANA NIRVANA NIRVANA	STRANGELOVE UITTLE 18 BERIND THE WHEEL TO HAVE AND TO HOLD NOTHING PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPIRIT IN BLOOM COME AS YOU ARE BREED LITTLE	NUSIC FOR THE MASSES MUSIC FOR THE MASSES NEVERMIND	WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS GEFFEN GEFFEN GEFFEN GEFFEN GEFFEN GEFFEN GEFFEN	82 2 114 3 7 2 2 2 40 27 41 28 2 2			
WEBCASTER A	DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE NIEVANA	STRANGELOVE UITTLE 18 BENIND THE WHEEL TO HAVE AND TO HOOLD NOTHING PLEASURE; LITTLE TREASURE SMELLS LIKE TEEN SPIRIT IN BLOOM COME AS YOUARE BREED LITHUM POLLY TERRITORIAL PISSINGS	NUSIC FOR THE MASSES NEVERNINO NEVERNINO NEVERNINO NEVERNINO NEVERNINO NEVERNINO NEVERNINO NEVERNINO	WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS GEFFEN GEFFEN GEFFEN GEFFEN GEFFEN GEFFEN GEFFEN GEFFEN GEFFEN	82 2 114 3 7 2 2 555 40 227 41 28 22 20			
WEBCASTER A	DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE MODE MODE MITVANIA	STRANGELOVE UTTLE 18 BENIND THE WHEEL TO HAVE AND TO HOLD NOTHING PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPIRIT IN BLOOM COME AS YOU ARE BREED LITHIUM POLLY TERRITORIAL PISSINGS DORAN YOU LOUNGE ACT	NUSIC FOR THE MASSES NEVERNINO	WARNER BROTHERS GEFFEN	82 2 114 3 7 2 2 2 40 27 41 28 2 2			
WEBCASTER A	DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE NIEVANA	STRANGELOVE UTTLE 18 BENIND THE WHEEL TO HAVE AND TO HOLD NOTHIND PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPRIT IN BLOOM COME AS YOU ARE UTTHER HOLD FOLLY TERRITORIAL PISSINGS DRAIN YOU LOUNDERAL PISSINGS DRAIN YOU LOUND ROLLY STAY AWAY ON A PLAIN	NUSIC FOR THE MASSES  MUSIC FOR THE MASSES  NEVERNIND	WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS OBFFEN GEFFEN	82 2 14 3 7 7 2 2 85 40 27 41 28 2 2 2 2 10 10 10 10 10 10 10 10 10 10 10 10 10			
WEBCASTER A	DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE NIRVANA	STRANGELOVE UTTLE 18 BENIND THE WHEEL TO HAVE AND TO HOLD NOTHING PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPIRIT IN BLOOM COME AS YOU ARE BREED LITHIUM POLLY TERRITORIAL PISSINGS DRAIN YOU LOUNGE ACT STAY AWAY ON A PLAIN SOMETHING IN THE WAY	NUSIC FOR THE MASSES NEVERNINO	WARNER BROTHERS GEFFEN	62 2 2 14 3 3 7 7 2 2 55 5 40 2 7 2 7 10 10 2 4 4 5 2 6 5 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3			
WEBCASTER A	DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE NIEVANA	STRANGELOVE UTTLE 18 BERIND THE WHEEL TO HAVE AND TO HOLD NOTHIND PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPRIT IN BLOOM COME AS YOU ARE BREED FROM THE	NUSIC FOR THE MASSES  MUSIC FOR THE MASSES  NEVERNIND	WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS WARNER BROTHERS OBFFEN GEFFEN	82 2 14 3 3 7 2 5 5 5 40 2 7 4 1 4 1 2 8 2 7 2 0 1 1 0 2 4 3 4 4 3 4 4 3 4 4 5 4 5 6 6 6 6 6 6 6 6 6 6 6 6 6 6 6			
MEBCASTER A	DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE NIRVANA	STRANGELOVE UTTLE 18 BENIND THE WHEEL TO HAVE AND TO HOLD NOTHING PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPIRIT IN BLOOM COME AS YOU ARE BREED LITHIUM POLLY TERRITORIAL PISSINGS DRAIN YOU LOUNGE ACT STAY AWAY ON A PLAIN SOMETHING IN THE WAY	NUSIC FOR THE MASSES NEVERNINO	WARNER BROTHERS OEFFEN GEFFEN	62 2 2 14 3 3 7 7 2 2 55 5 40 2 7 2 7 10 10 2 4 4 5 2 6 5 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3			
MEBCASTER A	DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE NIRVANA DARTH BROOKS GARTH BROOKS	STRANGELOVE UTTLE 18 BENIND THE WHEEL TO HAVE AND TO HOLD NOTHING PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPIRIT IN BLOOM COME AS YOU ARE BREED LITHIUM POLLY TERRITORIAL PISSINGS DORAN YOU LOUNDE ACT STAY AWAY ON A PLAIN SOMETHING IN THE WAY THE THUNDER ROLLS	NUSIC FOR THE MASSES MUSIC FOR THE MASSES NEVERMIND	WARNER BROTHERS GEFFEN	82 2 14 3 3 7 7 2 5 5 5 40 0 12 12 12 12 12 12 12 12 12 12 12 12 12			
VEBCASTER A	DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE NEVANA NIRVANA NIRVAN	STRANGELOVE UTTLE 18 BERIND THE WHEEL TO HAVE AND TO HOLD NOTHIND PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPRIT IN BLOOM COME AS YOU ARE BREED LITHIUM PRESSOR LITHLE TREASURE STREED LITHIUM PRESSOR LITHLE TREASURE STREED LITHIUM PRESSOR LITHIUM PRESSO	NUSIC FOR THE MASSES NUSIC FOR THE MASSES NUSIC FOR THE MASSES NUSIC FOR THE MASSES MUSIC FOR THE MASSES MUSIC FOR THE MASSES NUSIC FOR THE MASSES NEVERMIND	WARNER BROTIERS GEFFEN	62 2 2 14 3 3 7 7 2 2 55 5 40 2 7 2 7 10 10 2 4 4 5 2 6 5 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3			
WEBCASTER A	DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE NIRVANA GARTH BROOKS GARTH BROOKS GARTH BROOKS GARTH BROOKS	STRANGELOVE UTTLE 18 BENIND THE WHEEL TO HAVE AND TO HOLD NOTHING PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPIRIT IN BLOOM COME AS YOU ARE BREED LITHIUM POLLY TERRITORIAL PISSINGS DOLLY TERRITORIAL PISSINGS DOLLY LOUNGE ACT STAY AWAY ON A PLAIN SOMETHING IN THE WAY THE THUNDER ROLLS THOUGHER TOLLS HOUSE FRIENDS IN LOW PLACES WILD HORSES WILD HORSES UNLANAWERD PRAYERS	MUSIC FOR THE MASSES MUSIC FOR THE MU	WARNER BROTHERS GEFFEN GAPITOL CAPITOL CAPITOL	82 2 14 3 3 7 7 2 5 5 5 40 0 12 12 12 12 12 12 12 12 12 12 12 12 12			
WEBCASTER A	DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE NEWANA NIRVANA NIRVAN	STRANGELOVE UTTLE 18 BENIND THE WHEEL TO HAVE AND TO HOLD NOTHIND PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPRIT IN BLOOM COME AS YOU ARE BREED LITHUM POLLY FEMALES FINENDER FOLLS FRIENDS IN LOW PLACES INAD NOW FLACES UND HAVES JUANNEWERED PRAYERS WELCOME WE	NUSIC FOR THE MASSES MUSIC FOR THE MASSES NEVERMIND NO FENCES NO FENCES NO FENCES NO FENCES NO FORCES	WARNER BROTHERS GEFFEN	62 2 1 4 3 3 7 7 2 5 5 5 40 0 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2			
WEBCASTER A	DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE NIRVANA	STRANGELOVE UTTLE 18 BENIND THE WHEEL TO HAVE AND TO HOLD NOTHIND PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPIRIT IN BLOOM COME AS YOU ARE BREED LITHIUM POLLY TERRITORIAL PISSINGS DORAN YOU LOUNDE ACT STAY AWAY ON A PLAIN SOMETHING IN THE WAY THE THUNDER ROLLS THO FIRENDER WILD HORSES WILD HORSES UNLANSWERD PRAYERS WELCOME HE WORLD FALLS	NUSIC FOR THE MASSES  NEVERNINO  NO FENCES  NO FENCES  NO FENCES  NO FENCES  NO FENCES  NO FENCES  NO MORE NO MANTS  NO MASSINDIANS SAINTS	WARNER BROTHERS GEFFEN GAPITOL CAPITOL CAPITOL CAPITOL CAPITOL CAPITOL SONY	62 2 1 4 3 3 7 7 2 5 5 5 40 0 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2			
WEGCASTER A	DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE NEWANA NIRVANA NIRVAN	STRANGELOVE  UTTLE 18  BENIND THE WHEEL  TO HAVE AND TO HOLD  NOTHIND  PLEASURE, LITTLE TREASURE  SMELLS LIKE TEEN SPIRIT  IN BLOOM  COME AS YOU ARE  BREED  LITHIUM  POLLY  TERNITICALA, PISSINGS  DORAN YOU  LOUNGE ACT  STRANGE ROLLS  TO ANN  SOMETHING IN THE WAY  THE THUNGER ROLLS  TWO OF A KIND, WORKIN ON A FULL  HOUSE  FRIENDS IN LOW PLACES  UND ANSWERED PRAYERS  WELCOME WE  WORLD FALLS  WELCOME WE  WORLD FALLS  SOUTHLAND IN THE SPRINGTIME	NUSIC FOR THE MASSES MUSIC FOR THE MASSES NEVERMIND NOFENCES NO FENCES	WARNER BROTHERS GEFFEN GEFFE	62 2 1 4 3 3 7 7 2 5 5 5 40 0 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2			
WHECASTER A WEDCASTER A	DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE NEWANA NIRVANA NIRVAN	STRANGELOVE UTTLE 18 BENIND THE WHEEL TO HAVE AND TO HOLD NOTHIND PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPIRIT IN BLOOM COME AS YOU ARE BREED LITHIUM POLLY TERRITORIAL PISSINGS DORAN YOU LOUNGE ACT STRAY AWAY ON A FUN THE HUNDER ROLLS WE JEF AND, WORKIN ON A FULL YOUSE FRIENDE IN LOW PLACES UND HUNDER POLYES WELD HUNDER POLYES WELD HUNDER POLYES WELD HUNDER POLYES WELCOME WE WORLD FALLS SOUTHLAND IN THE SPRINGTIME WATERSHED HAND WE DOWNS	NUSIC FOR THE MASSES  NEVERNINO  NO FENCES  NO FENCES  NO FENCES  NO FENCES  NO FENCES  NO FENCES  NO MORE NO MANTS  NO MASSINDIANS SAINTS	WARNER BROTHERS GEFFEN GE	62 2 1 4 3 3 7 7 2 5 5 5 40 0 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2			
MEBCASTER A	DEFECHE WODE DEFECHE WODE DEFECHE WODE DEFECHE WODE DEFECHE WODE DEFECHE WODE NIEVANA	STRANGELOVE  LUTTLE 18  BENIND THE WHEEL  TO HAVE AND TO HOLD  NOTHING  PLEASURE, LITTLE TREASURE  SMELLS LIKE TEEN SPIRIT  IN BLOOM  COME AS YOU ARE  BREED  LUTHIUM  POLLY  TERRITORIAL, PISSINGS  CORAN YOU  LOUNDE ACT  STAY AWAY  ON A PLAIN  SOMETHING IN THE WAY  THE THUNDER ROLLS  THO OF A LIND, WORKIN ON A FULL  HOUSE  MILD HORSES  MILD HORSES  JUNANSWERED PRAYERS  WELCOME WE  WELCOME WE  WORLD FALLS  SOUTHLAND IN THE SPRINGTIME  WATERSHED  HAND WE DOWNS  DOWN TERRITORIAL  SOUTTELAND IN THE SPRINGTIME  WELCOME WE  WORLD FALLS  SOUTHLAND IN THE SPRINGTIME  WATERSHED  HAND WE DOWNS  DOWN THE YOU THE YOU GHE HOUGH  HOUSE  THE STRINGTIME  WELCOME WE  WORLD FALLS  SOUTHLAND IN THE SPRINGTIME  WATERSHED  HAND WE DOWNS  DOWN TO THE YOU GHE HOUGH	NUSIC FOR THE MASSES NEVERNINO NO FENCES NO FENCES NO FENCES NO FENCES NO FENCES NO MASS INDIANS SAINTS NOMADS INDIANS SAINTS	WARNER BROTHERS GEFFEN GEFFE	62 2 1 4 3 3 7 7 2 5 5 5 40 0 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2			
WEBCASTER A	DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE DEPECHE WODE NEVANA NIRVANA NIRVAN	STRANGELOVE  LUTTLE 18 BENIND THE WHEEL TO HAVE AND TO HOLD NOTHIND PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPRITT IN BLOOM COME AS YOU ARE BREED  LUTHIUM POLLY TERRITORIAL PISSINGS DORAN YOU LUNDER ACT STAY AWAY ON A PLAN SWETTING IN THE WAY THE THRODER ROLL THE WOOR AND SWETTING THE WAY THE THRODER ROLL THE RIBERT OF THE WAY THE THRODER ROLL THE WAY THE THRODER ROLL WILD LOW PLACES UNANSWERED PRAYERS WELCOME WE WORLD FALLS SOUTHLAND IN THE SPRINGTIME WATERSHED HAND WE DOWNS DOWNS WELCOME WE WATERSHED HAND WE DOWNS DOW	NUSIC FOR THE MASSES MUSIC FOR THE MASSES NEVERMIND NO FENCES NO FENCE	WARNER BROTHERS GEFFEN GE	62 2 1 4 3 3 7 7 2 5 5 5 40 0 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2			
WEBCASTER A	DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE NERVANA NIRVANA	STRANGELOVE UTTLE 18 BERIND THE WHEEL TO HAVE AND TO HOLD NOTHIND PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPRIT IN BLOOM COME AS YOU ARE SMELLS LIKE TEEN SPRIT IN BLOOM COME AS YOU ARE SMELLS LIKE TEEN SPRIT IN BLOOM FOLLY TEERTTORIAL PISSINGS DRAIN YOU LOUNDER AND YOU STAY AWAY ON A PUALN SOMETHING IN THE WAY THE THUNDER ROLLS TWO OF A KIND, WORKIN ON A FULL HOUSE FRIENDS IN LOW PLACES UNANSWERED PRAYERS WELCOME WE WORLD FALLS WOONED THE SPRINGTIME MAND WE DOWNS SOUTH SAND IN THE SPRINGTIME MAND WE DOWNS SOUTH STORY IT YOU GET ENOUGH ROCK WITH YOU WORKING DAY AND NIGHT	NUSIC FOR THE MASSES  NEVERNINO  NO FENCES  NO FENCES  NO FENCES  NO MADS INDIANS SAINTS  NOMADS INDIANS SAINTS	WARNER BROTHERS GEFFEN GE	62 2 2 14 4 3 3 7 7 2 2 5 5 5 5 4 4 0 2 7 7 1 1 0 1 0 1 1 0 1 1 0 1 1 1 1 1 1 1			
WEBCASTER A	DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE DEFECHE MODE NERVANA NIRVANA	STRANGELOVE UTTLE 18 BERIND THE WHEEL TO HAVE AND TO HOLD NOTHIND PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPRIT IN BLOOM COME AS YOU ARE SMELLS LIKE TEEN SPRIT IN BLOOM COME AS YOU ARE SMELLS LIKE TEEN SPRIT IN BLOOM FOLLY TEERTTORIAL PISSINGS DRAIN YOU LOUNDER AND YOU STAY AWAY ON A PUALN SOMETHING IN THE WAY THE THUNDER ROLLS TWO OF A KIND, WORKIN ON A FULL HOUSE FRIENDS IN LOW PLACES UNANSWERED PRAYERS WELCOME WE WORLD FALLS WOONED THE SPRINGTIME MAND WE DOWNS SOUTH SAND IN THE SPRINGTIME MAND WE DOWNS SOUTH STORY IT YOU GET ENOUGH ROCK WITH YOU WORKING DAY AND NIGHT	NUSIC FOR THE MASSES MUSIC FOR THE MASSES NEVERMIND NO FENCES	WARNER BROTHERS GEFFEN	82 2 14 3 3 7 2 5 5 5 40 0 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2 1 2			
MEBCASTER A	DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE DEPECHE MODE NEVANA NIRVANA N	STRANGELOVE  LUTTLE 18 BENIND THE WHEEL TO HAVE AND TO HOLD NOTHIND PLEASURE, LITTLE TREASURE SMELLS LIKE TEEN SPRITT IN BLOOM COME AS YOU ARE BREED  LUTHIUM POLLY TERRITORIAL PISSINGS DORAN YOU LUNDER ACT STAY AWAY ON A PLAN SWETTING IN THE WAY THE THRODER ROLL THE WOOR AND SWETTING THE WAY THE THRODER ROLL THE RIBERT OF THE WAY THE THRODER ROLL THE WAY THE THRODER ROLL WILD LOW PLACES UNANSWERED PRAYERS WELCOME WE WORLD FALLS SOUTHLAND IN THE SPRINGTIME WATERSHED HAND WE DOWNS DOWNS WELCOME WE WATERSHED HAND WE DOWNS DOW	NUSIC FOR THE MASSES  NEVERNINO  NO FENCES  NO FENCES  NO FENCES  NO MADS INDIANS SAINTS  NOMADS INDIANS SAINTS	WARNER BROTHERS GEFFEN GE	62 2 2 14 4 3 3 7 7 2 2 5 5 5 5 4 4 0 2 7 7 1 1 0 1 0 1 1 0 1 1 0 1 1 1 1 1 1 1			

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EGORY	FEATURED ARTIST	SOUND RECORDING TITLE ISR		MARKETING LABEL	ORMANCES	AGGREGATE_TUNING_HO	CHANNEL DR PROGRAM NAME	PLAY FREQUENC
BCASTER A	MICHAEL JACKSON MICHAEL JACKSON	SHE'S OUT OF MY LIFE	OFF THE WALL	SONY	8			
CASTER A	MICHAEL JACKSON	IT'S THE FALLING IN LOVE	OFF THE WALL	SONY	18			
CASTER A	MICHAEL JACKSON	BURN THIS DISCO OUT	OFF THE WALL	SONY	5			
CASTER A CASTER A CASTER A	SIMPLE MINDS	ALIVE AND KICKING	ONCE UPON A TIME	VIRGIN	25			
CASTER A	DIRE STRAITS	WHEN IT COMES TO YOU	ON EVERY STREET	WARNER BROTHERS	1			
CASTER A	PRINCE	RAG DOLL	PERMANENT VACATION	WARNER BROTHERS GEFFEN	26			
CASTER A CASTER A	AEROSMITH	DUDE (LOOKS LIKE A LADY)	PERMANENT VACATION	GEFFEN	15			
CASTER IA	AEROSMITH	ANGEL	PERMANENT VACATION	GEFFEN	10			
CASTER A CASTER A	EDIE BRICKELL	LOST IN THE MOMENT I SAW HER STANDING THERE	PICTURE PERFECT MORNING PLEASE PLEASE ME	GEFFEN	4			
CASTER A	THE BEATLES	SAW HER STANDING THERE	PLEASE PLEASE ME	APPLE	7			
CASTER A	THE BEATLES	ANNA (GO TO HIM)	PLEASE PLEASE ME	APPLE	5			
CASTER A	THE BEATLES	ASK ME WHY PLEASE PLEASE ME	PLEASE PLEASE ME PLEASE PLEASE ME	APPLE	18			
CASTER A	THE BEATLES	LOVE ME DO	PLEASE PLEASE ME	APPLE	17			
ASTER A	THE BEATLES	P. S. I LOVE YOU	PLEASE PLEASE ME	APPLE	15			
ASTER A	THE BEATLES	DO YOU WANT TO KNOW A SECRET	PLEASE PLEASE ME	APPLE	10			
ASTER A	THE BEATLES	TWIST AND SHOUT	PLEASE PLEASE ME	APPLE	23			
ASTER A	SPIN DOCTORS	JAMMY OLSEN'S BLUES	POCKET FULL OF KRYPTONITE	SONY	3			
ASTER A	SPIN DOCTORS	LITTLE MISS CAN'T BE WRONG TWO PRINCES	POCKET FULL OF KRYPTONITE POCKET FULL OF KRYPTONITE	SONY	4			
ASTER A	SPIN DOCTORS UB40	CAN'T HELP FALLING IN LOVE	PROMISES AND LIES	VIRGIN	3		-	
	00.0	THERE AIN'T NOTHIN WRONG WITH THE	THOMPSO PETO E-EO	7.11,000	-			
ASTER A	AARON TIPPIN	RADIO	READ BETWEEN THE LINES	BMG SPECIAL PRODUCTS	4			331
ASTER IA	BRYAN ADAMS	RUN TO YOU	RECKLESS	A&M RECORDS	7			
ASTER A	BRYAN ADAMS	HEAVEN	RECKLESS	AAM RECORDS	10			
ASTER A	BRYAN ADAMS	SOMEBODY	RECKLESS	A&M RECORDS	3			
CASTER A	BRYAN ADAMS FOREIGNER	SUMMER OF '89 DOUBLE VISION	RECKLESS RECORDS	A&M RECORDS ATLANTIC	10			
ASTER A	INDIGO GIRLS	GHOST	RITES OF PASSAGE	SONY	3			The state of the s
ASTER A	INDIGO GIRLS	JONAS & EZEKIAL	RITES OF PASSAGE	SONY	4			
CASTER IA	INDIGO GIRLS	LOVE WILL COME TO YOU	RITES OF PASSAGE	SONY	4			
CASTER A	INDIGO GIRLS	VIRGINIA WOOLF	RITES OF PASSAGE	SONY	8			
ASTER A	RUSH	DREAMLINE	ROLL THE BONES	POLYGRAM	3			
ASTER A ASTER A ASTER A	GARTH BROOKS	ROLL THE BONES RODEO	ROLL THE BONES	POLYGRAM	2			
ASTER A	GARTH BROOKS	WHAT SHE'S DOING NOW	ROPIN THE WIND	CAPITOL	10			
ASTER A	GARTH BROOKS	PAPA LOVED MAMA	BOSIN THE WIND	CAPITOL	10			
CASTER A	GARTH BROOKS GARTH BROOKS	SHAMELESS	ROPIN THE WIND	CAPITOL	8		1	-
CASTER IA	GARTH BROOKS	THE RIVER	ROPIN' THE WIND	CAPITOL	10			
CASTER A	REBA MCENTIRE	RUMOR HAS IT	RUMOR HAS IT	MCA	34			
	REBA MCENTIRE	YOULIE	RUMOR HAS IT	MCA	43			
ASTER A	REBA MCENTIRE	FANCY	RUMOR HAS IT	MCA	10			
ASIER M	SEAL	CRAZY	SEAL (1991) SHAKING THE TREE: 16 GOLDEN	WARNER BROTHERS	12			
CASTER A	PETER GABRIEL	SOLSBURY HILL	GREATS	GEFFEN	22			
			SHAKING THE TREE: 16 GOLDEN	OE TEN	-			
CASTER A	PETER GABRIEL	SLEDGEHAMMER	GREATS	GEFFEN	2		The second second	
			SHAKING THE TREE: 16 GOLDEN					
CASTER A	PETER GABRIEL	MERCY STREET	GREATS	GEFFEN	5			
	DETER GARDIE		SHAKING THE TREE: 16 GOLDEN					1 - 1 - 1 V
CASTER A	PETER GABRIEL	DON'T GIVE UP (FEAT, KATE BUSH)	GREATS SHAKING THE TREE: 18 GOLDEN	GEFFEN	44			
CASTER A	PETER GABRIEL	SAN JACINTO	GREATS	GEFFEN				
-Uith h	TETEN GROWEL	SAN SACINIO	SHAKING THE TREE: 16 GOLDEN	GEFFEN	-			
CASTER A	PETER GABRIEL	HERE COMES THE FLOOD	GREATS	GEFFEN	3	SUPERIOR STATE		
			SHAKING THE TREE: 16 GOLDEN					
CASTER A	PETER GABRIEL	RED RAIN	GREATS	GEFFEN	1	The state of the s		
			SHAKING THE TREE: 16 GOLDEN					
CASTER A	PETER GABRIEL	GAMES WITHOUT FRONTIERS	GREATS	GEFFEN	28			
CASTER A	PETER GABRIEL	SHOCK THE MONKEY	SHAKING THE TREE: 16 GOLDEN	acces.				- 100
Marien A	FETER GABRIEL	SHUCK THE MUNKET	SHAKING THE TREE: 16 GOLDEN	GEFFEN	23	-		
CASTER A	PETER GABRIEL	I HAVE THE TOUCH	GREATS	GEFFEN	9	N. C. State of the Control of the Co		
			SHAKING THE TREE: 16 GOLDEN	OC. TEN	-			
CASTER A	PETER GABRIEL	віко	GREATS	GEFFEN	7			CONTRACTOR OF THE PARTY OF THE
	EDIE BRICKELL & NEW		SHOOTING RUBBERBANDS AT THE					
ASTER A	BOHEMIANS	WHATIAM	STARS	GEFFEN	25			
ASTER A	EDIE BRICKELL & NEW BOHEMIANS	CIDCLE	SHOOTING RUBBERBANDS AT THE					The same
Water V	EDIE BRICKELL & NEW	CIRCLE	SHOOTING RUBBERBANDS AT THE	GEFFEN	13			
ASTER A	BOHEMIANS	NOTHING	STARS	GEFFEN	2	C. C. C. W. C.		
ASTER A	SUZANNE VEGA	TOM'S DINER	SOLITUDE STANDING	AAM RECORDS	3			
ASTER A	SUZANNE VEGA	LUKA	SOLITUDE STANDING	A&M RECORDS	7			
ASTER A	SUZANNE VEGA	NIGHT VISION	SOLITUDE STANDING	A&M RECORDS	4			
ASTER A	SUZANNE VEGA	GYPSY	SOUTUDE STANDING	A&M RECORDS	7			
ASTER A	BILLY RAY CYRUS	COULD'VE BEEN ME ACHY BREAKY HEART	SOME GAVE ALL	POLYGRAM	5			
ASTER A	BILLY RAY CYRUS	SHE'S NOT CRYIN ANYMORE	SOME GAVE ALL	POLYGRAM	22			
ASTER A	BILLY RAY CYRUS	WHER'M I GONNA LIVE?	SOME GAVE ALL	POLYGRAM	3			
ASTER A	JIMMY BUFFETT	CHEESEBURGER IN PARADISE	SONGS YOU KNOW BY HEART	MCA	7			
ASTER A	JIMMY BUFFETT	FINS	SONGS YOU KNOW BY HEART	MCA	7			
ASTER A	JIMMY BUFFETT	SON OF A SON OF A SAILOR	SONGS YOU KNOW BY HEART	MCA	-			-

	TRANSMISSION_CAT		SOUND RECORDING TITLE	ISRC	ALBUM TITLE	MARKETING LABEL		AGGREGATE_TUNING_HO	CHANNEL OR PROGRAM NAME	PLAY FREQUENCY
EBCASTER	A		A PIRATE LOOKS AT FORTY	-	SONGS YOU KNOW BY HEART	MCA	37	Unity .	DISCHALL SIL PROGRAM TIME	PER PRESENT
EBCASTER	A	JIMMY BUFFETT	MARGARITAVILLE		SONGS YOU KNOW BY HEART	MCA	10			
EBCASTER	A	JIMMY BUFFETT	COME MONDAY	1	SONGS YOU KNOW BY HEART	MCA	5			
			CHANGES IN LATITUDES, CHANGES IN							
EBCASTER	A	JIMMY BUFFETT	ATTITUDES		SONGS YOU KNOW BY HEART	MCA	49			
EBCASTER	A	JIMMY BUFFETT	BOAT DRINKS		SONGS YOU KNOW BY HEART	MCA	3			
ERCASTER	A	JIMMY BUFFETT	VOLCANO		SONGS YOU KNOW BY HEART	MCA	7		Description of the last of the	
ESCASTER	A	PETER GABRIEL	RED RAIN		so	GEFFEN	9			
EBCASTER	A		SLEDGEHAMMER		SO	GEFFEN	7			
EBCASTER	A	PETER GABRIEL	THAT VOICE AGAIN		so	GEFFEN	5			
EBCASTER	A	PETER GABRIEL	IN YOUR EYES		SO	GEFFEN	58			
EBCASTER	A	PETER GABRIEL	BIG TIME		so	GEFFEN	10			
EBCASTER	A	PAULA ABOUL	RUSH RUSH		SPELLBOUND	VIRGIN	10			
EBCASTER	A	PAULA ABDUL	BLOWING KISSES IN THE WIND		SPELLBOUND	VIRGIN	5			
EBCASTER	A	THE CHURCH	UNDER THE MILKY WAY		STARFISH	ARISTA	78			
EBCASTER	A	THE CHURCH	ANTENNA		STARFISH	ARISTA	7			
EBCASTER	A	THE CHURCH	REPTILE		STARFISH	ARISTA	12			
EBCASTER	A	SOUNDGARDEN	MY WAVE		SUPERUNKNOWN	A&M RECORDS	16			
EBCASTER	A	SOUNDGARDEN	SUPERUNKNOWN	-	SUPERUNKNOWN	A&M RECORDS	2			
EBCASTER	A	SOUNDGARDEN	BLACK HOLE SUN		SUPERUNKNOWN	A&M RECORDS	47			
EBCASTER	A	SOUNDGARDEN	SPOONMAN		SUPERUNKNOWN	A&M RECORDS	46			
EBCASTER	A	SOUNDGARDEN	THE DAY I TRIED TO LIVE		SUPERUNKNOWN	A&M RECORDS	13	a star same a series		
EBCASTER	A	SOUNDGARDEN	LIKE SUICIDE		SUPERUNKNOWN	A&M RECORDS	6			
EBCASTER	A	INDIGO GIRLS	LEAST COMPLICATED		SWAMP OPHELIA	SONY	10			
EBCASTER	A	INDIGO GIRLS	TOUCH ME FALL		SWAMP OPHELIA	SONY	3			
EBCASTER	A	INDIGO GIRLS	THE WOOD SONG		SWAMP OPHELIA	SONY	3			
EBCASTER	A	INDIGO GIRLS	DEAD MAN'S HILL		SWAMP OPHELIA	SONY	12			
EBCASTER	A	INDIGO GIRLS	FARE THEE WELL		SWAMP OPHELIA	SONY	3		Parket Committee	
EBCASTER	A	PEARL JAM	ONCE	-	TEN	SONY	4			
EBCASTER	A	PEARL JAM	EVEN FLOW	-	TEN	SONY	121			
EBCASTER	A	PEARL JAM	ALIVE		TEN	SONY	50			
EBCASTER	A	PEARL JAM	WHY GO		TEN	SONY	69			
EBCASTER	A	PEARL JAM	BLACK		TEN	SONY	105			
EBCASTER	A	PEARL JAM	JEREMY		TEN	SONY	14			
EBCASTER	A	PEARL JAM	OCEANS		TEN	SONY	64			
EBCASTER	A	PEARL JAM	GARDEN		TEN	SONY	68			
EBCASTER	A	PEARL JAM	DEEP		TEN	SONY	70			
EBCASTER	A	BLONDIE	HEART OF GLASS		THE BEST OF BLONDIE	CAPITOL	88			
EBCASTER	A	BLONDIE	DREAMING		THE BEST OF BLONDIE	CAPITOL	6			
EBCASTER	A	BLONDIE	THE TIDE IS HIGH		THE BEST OF BLONDIE	CAPITOL	31			
EBCASTER	A	BLONDIE	HANGING ON THE TELEPHONE		THE BEST OF BLONDIE	CAPITOL	2			
EBCASTER	A	BLONDIE	RAPTURE		THE BEST OF BLONDIE	CAPITOL	39			
EBCASTER	A	BLONDIE	ONE WAY OR ANOTHER		THE BEST OF BLONDE	CAPITOL	11			
EBCASTER	A	BLONDIE	CALL ME		THE BEST OF BLONDIE	CAPITOL	86		The second secon	
EBCASTER	A	BLONDIE	ATOMIC		THE BEST OF BLONDIE	CAPITOL	7			
EBCASTER	A	JETHRO TULL	TEACHER		THE BEST OF JETHRO TULL	CAPITOL	117	THE RESERVE OF STREET		
EBCASTER	A	JETHRO TULL	AQUALUNG	-	THE BEST OF JETHRO TULL	CAPITOL	18			
EBCASTER	M.	JETHRO TULL	THICK AS A BRICK EDIT #1		THE BEST OF JETHRO TULL	CAPITOL	12			

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SOURCECHANGE 1990 CONNECTICUT AVE. NW., SUITE 990, WASHINGTON, DC 2. \_\_.6 P. 202.828.0120 F: 202.833.2141 WWW.SDUNDEXCHANGE.COM

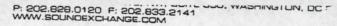
#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > DISTRIBUTION SUMMARY

Earning Entity: Earning Enity ID:

#### Statement Issue Date:

Grand total of royalties collected for this distribution period: \$4,765,587.50

Source	Perlod	Royalty Share	Earning Entity Share
Total Royalty value earned for Current Period:			
SDARS Ephemeral	Jul 2004 - Dec 2004	100.00%	\$834.91
Satellite Service	Jul 2004 - Dec 2004	50.00%	\$4,326.38
Subscription Service	Jul 2004 - Dec 2004	50.00%	\$1,703.80
Royalties earned from Previous Distribution(s):			
Adjustment Credits:			
	To	otal Earning Entity Share:	\$6,865.09



EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > EARNING ENTITY OVERVIEW

Earning Entity: Earning Entity ID:

ity ID:

Statement Issue Date:

Entity ID Entity Name  Earning Entity	<b>S</b>	hare 00.00%	Current Distribution \$6,865.08	Previous Distribution \$0.00	\$0.00	\$6,865.08
					Total:	\$6,865.08

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PAYEE OVERVIEW

Earning Entity: Earning Entity ID:

#### Statement Issue Date:

Entity ID - Entity Name	Payee	Share	Current Distribution	Previous Distribution	Adjustment Credits	Adjustment Debits	Prior Payee Balance	Royalties Distributed	Status
	(الاستنسان	100.00%	\$6,865.08	\$0.00	\$0.00	-\$24.33	\$0.00	\$6,840.76	Paid
						To	otal:	\$6,840.76	

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PAYMENT OVERVIEW

Payee:

Payee ID:

Statement Issue Date:

ntity ID ... Entity Name

\$6,840.76

Total: \$6,840.76

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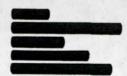
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EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > LABEL DETAIL

Label Information<sup>1</sup>





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EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

**Current Distribution** 

**Subscription Service** 

Period: Jul 2004 - Dec 2004

**Entity Name:** 

Entity ID:

Total Titles for Entity: 418

Title Artist Album Label	Performance Value	Earning Entity Share
()	\$1.12	
에 Committee	\$6.97	\$3.49
	\$6.27	\$3.13
	\$7.06	\$3.53
	\$6.88	\$3.44
	\$6.97	\$3.49
	\$7.06	\$3.53
	\$1.10	\$0.55
	\$1.78	\$0.89
	\$11.95	\$5.97
	\$6.17	\$3.09
(a) <b>(c) (c) (c) (c) (c) (c) (c) (c) (c) (c) </b>	\$6.17	\$3.09
10. <b>(1999-1999</b> ) [[[[[]]]] [[[]] [[]] [[]] [[]] [[]] [	\$0.76	\$0.38
[12]	\$2.29	\$1.14
	\$12.96	\$6.48
	\$8.40	\$4.20
	\$10.62	
	\$5.59	\$2.80
	\$30.41	\$15.21
	\$11.03	\$5.52
	\$6.09	\$3.05
18	\$0.07	\$0.03
	\$5.85	\$2.92
	\$5.59	\$2.80
	\$5.59	\$2.80
	\$5.59	\$2.80

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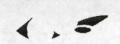


## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label Performance Value	
\$0.11	\$0.06
642.40	
\$13.12 \$1.02 \$1.02 \$1.02 \$0.76	
\$1.02	\$0.51
\$0.76	
\$7,62	A. C.
\$2.62	
\$0.79	
\$38.02	\$19.01
\$13.32	\$6.66
\$4.57	\$2.29
\$5.08	\$2.54
\$4.32	\$2.16
\$3.81	\$1.91
\$6.10	\$3.05
\$5.59	\$2.80
\$3.49 \$21.86 \$32.25	\$1.74
\$3.49 \$21.86	\$10.93
	\$16.12
\$19.32	\$9.66
\$7.59	\$3.80
\$1.99	\$0.99
\$1.07	\$0.54
\$1.07	\$0.54
\$0.94	\$0.47
\$1.03	\$0.51
\$0.96	\$0.48

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album: Label	Performance	Earning Entity
	Value	Share
	\$0.98	\$0.49
	\$2.80	\$1.40
	\$34.82	\$17.41
	\$6.88	\$3.44
	\$9.44	\$4.72
	\$42.19	\$21.10
	\$8.65	\$4.32
	\$6.80	\$3.40
	\$6.71	\$3.35
	\$6.71	\$3.35
40	\$6.71	\$3.35
	\$6.10	\$3.05
	\$11.95	\$5.97
	\$1.36	\$0.68
[18]	\$22.37	\$11.18
	\$1.65	\$0.83
	\$12.71	\$6.35
	\$7.12	\$3.56
	\$1.56	\$0.78
3	\$0.54	\$0.27
4)	\$0.31	\$0.16
	\$16.27	\$8.13
	\$1.78	\$0.89
	\$2.29	\$1.14
	\$2.29	\$1.14
	\$2.03	\$1.02
	\$2.03	\$1.02
	\$2.54	\$1.27
	\$2.80	\$1.40
	\$2.29	\$1.14
	\$2.29	\$1.14
	\$2.29	\$1.14
	\$2.03	\$1.02
	\$2.29	\$1.14
	\$2.29	\$1.14
	\$2.80	\$1.40

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#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Label	Performance Value	Earning Entity Share
DIMENSIONAL MANAGEMENT STATES OF THE PROPERTY	\$2.29	\$1.14
	\$2.03	\$1.02
	\$2.29	\$1.14
	\$2.80	\$1.40
	\$2.29	\$1.14
	\$2.29	\$1.14
	\$2.03	\$1.02
	\$2.29	\$1.14
	\$2.29	\$1.14
	\$2.03	\$1.02
	\$2.29	\$1.14
	\$5.34	\$2.67
	\$5.08	\$2.54
	\$5.59	\$2.80
	\$5.85	\$2.92
	\$5.59	\$2.80
	\$5.85	\$2.92
	\$5.59	\$2.80
	\$6.86	\$3.43
	\$6.10	\$3.05
	\$5.85	\$2.92
	\$5.59	\$2.80
	\$5.85	\$2.92
	\$5.59	\$2.80
	\$6.61	\$3.30
	\$5.85	\$2.92
	\$6.10	\$3.05
	\$5.34	\$2.67
	\$7.12	\$3.56

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#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance E Value	Earning Entity Share
	\$5.59	\$2.80
	\$6.10	\$3.05
	\$5.85	\$2.92
	\$1.02	\$0.51
	\$0.98	\$0.49
	\$0.25	\$0.12
	\$5.59	\$2.80
	\$1.23	\$0.61
	\$5.34	\$2.67
	\$5.08	\$2.54
	\$24.15	\$12.07
	\$9.66	\$4.83
	\$2.80	\$1.40
	\$6.00	\$3.00
	\$8.30	\$4.15
	\$8.12	\$4.06
	\$4.24	\$2.12
	\$5.30	\$2.65
	\$6.88	\$3.44
	\$6.44	\$3.22
	\$7.33	\$3.66
	\$3.35	\$1.68
	\$0.74	\$0.37
	\$0.25	\$0.12
	\$0.47	\$0.23
	\$0.45	\$0.22
	\$0.25	\$0.12
	\$0.25	\$0.12

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title Afficia A Album Label	Performance I	Earning Entity
	Value /	Share
	\$3.44	\$1.72
	\$6.18	\$3.09
	\$4.68	\$2.34
	\$5.21	\$2.60
[1]	\$5.21	\$2.60
	\$5.83	\$2.91
	\$0.88	\$0.44
	\$5.03	\$2.52
	\$4.07	\$2.03
	\$4.24	\$2.12
[18] [18] [18] [18] [18] [18] [18] [18]	\$5.08	\$2.54
	\$5.56	\$2.78
	\$6.09	\$3.05
	\$4.77	\$2.38
	\$1.52	\$0.76
	91.52	\$0.76
	0.00	
	\$1.07	\$0.54
	\$0.13	\$0.07
	\$3.78	\$1.89
	\$3.04	\$1.52
	\$7.62	\$3.81
	\$0.56	\$0.28
	\$0.45	\$0.22
	40.43	\$0.22
	\$0.38	\$0.19
	\$0.92	\$0.46
	\$1.18	\$0.59
	\$4.07	\$2.03
	\$10.67	\$5.34
	\$12.20	\$6.10
	\$11.95	\$5.97
	411.00	45.51

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title Artist Album Label Perfo	mance Ear	And Falls
Label:	Value *	rning Entity Share
	\$0.02	\$0.01
	\$0.04	\$0.02
	\$2.80	\$1.40
	\$0.51	\$0.25
	\$3.13	\$1.56
	\$26.69	\$13.34
	\$4.32	\$2.16
	\$1.07	\$0.54
	\$0.22	\$0.11
	\$3.20	\$1.60
	\$3.56	\$1.78
	\$5.07	\$2.54
	\$12.45	\$6.23
	12.96	\$6.48
	554.18	\$27.09
	\$5.34	\$2.67
	\$1.52	\$0.76
	\$0.25	\$0.13
	\$0.25	\$0.13
	22.87	\$11.44
	30.75	\$15.38
	\$0.16	\$0.08
그는 그 그 그 그 그 그는 그는 그는 그는 그는 그는 그는 그는 그는	\$1.02	\$0.51
	34.31	\$17.16
	\$0.29	\$0.15
	\$8.96	\$4.48
	\$1.06	\$0.53

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

1	itle Artist Album Label	Performance Value	Earning Entity Share
•		\$0.18	\$0.09
•		\$0.18	\$0.09
•		\$5.85	\$2.92
•		\$3.81	\$1.91
		\$1.02	\$0.51
		\$8.13	\$4.07
		\$0.29	\$0.15
•		\$0.16	\$0.08
•		\$0.51	\$0.25
		\$3.56	\$1.78
		\$1.27	\$0.64
		\$22.11	\$11.06
	[1] [1] [1] [1] [1] [2] [2] [3] [3] [3] [4] [4] [4] [4] [4] [4] [4] [4] [4] [4	\$10.67	\$5.34
		\$24.91	\$12.45
		\$2.53	\$1.26
		\$6.35	\$3.18
		\$24.15	\$12.07
		\$22.62	\$11.31
		\$8.39	\$4.19
•		\$5.34	\$2.67
•		\$0.25	\$0.13
		\$2.57	\$1.29
		\$1.02	\$0.51
		\$43.72	\$21.86
		\$6.42	\$3.21

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS



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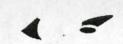
#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title - Artist Album s Label Perfo	ormance Value	Earning Entity Share
	\$0.29	\$0.15
	\$0.18	\$0.09
	\$12.96	\$6.48
	\$0.29	\$0.15
	\$0.18	\$0.09
	\$0.25	\$0.13
	\$9.66	\$4.83
	\$3.56	\$1.78
	\$0.18	\$0.09
	\$0.18	\$0.09
	\$1.52	\$0.76
	\$36.09	\$18.05
	\$17.03	\$8.51
이 경우 사용하는 것 같아요. 그는 것 같아요.	\$4.24	\$2.12
	\$1.27	\$0.64
	\$2.54	\$1.27
	\$1.41	\$0.70
	\$1.02	\$0.51
	\$2.80	\$1.40
	\$3.30	\$1.65
	\$14.74	\$7.37
그 프로그램 이 시간 경기 시간 선생님에 되었다. 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그	\$6.61	\$3.30
	\$1.02	\$0.51
(	\$6.14	\$3.07
	\$18.81	\$9.40
	\$0.29	\$0.15
	\$7.12	\$3.56
	\$0.25	\$0.13
	\$0.25	\$0.13
	\$59.73	\$29.86

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity Share
	\$69.39	possession and the second Section States
	\$4.33	\$34.69 \$2.16
	\$13.47	\$6.74
	\$5.34	\$2.67
	\$1.41	\$0.70
	\$0.29	\$0.15
	\$0.16	\$0.08
	\$4.83	\$2.41
	\$1.78	\$0.89
	\$1.02	\$0.51
	\$15.00	\$7.50
	\$27.96	\$13.98
	\$0.62	\$0.31
	\$0.20	\$0.10
	\$0.18	\$0.09
	\$1.02	\$0.51
	\$5.34	\$2.67
	\$1.18	\$0.59
	\$1.02	\$0.51
	\$1.02	\$0.51
	\$0.20	\$0.10
	\$0.18	\$0.09
	\$0.20	\$0.10
	\$3.56	\$1.78
	\$34.57	\$17.28
	\$4.33	\$2.16
	\$13.28	\$6.64
	\$13.22	\$6.61

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Value	Earning Entity Share
	\$49.99	\$24.99
	\$7.12	\$3.56
	\$1.10	\$0.55
	\$6.86	\$3.43
	\$17.54	\$8.77
	\$44.48	\$22.24
	\$0.76	\$0.38
	\$0.25	\$0.13
	\$2.29	\$1.14
	\$0.18	\$0.09
	\$0.16	\$0.08
	\$2.24	\$1.12
	\$1.12	\$0.56
	\$19.57	\$9.79
[2]	\$1.52	\$0.76
	\$19.57	\$9.79
다는 그	\$6.86	\$3.43
[1]	\$1.78	\$0.89
	\$6.61	\$3.30
	\$19.07	\$9.53
	\$22.37	\$11.18
	\$1.52	\$0.76
	\$1.12	\$0.56
	\$1.65	\$0.83
	\$1.02	\$0.51
	\$0.51	\$0.25
	\$1.27	\$0.64
	\$0.20	\$0.10
	\$0.29	\$0.15

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Titie Artist Artist Artist Label	Performance Value	Earning Entity Share
	\$0.13	\$0.07
	\$11.95	
	\$4.33	
	\$0.49	\$0.25
	\$12.71	\$6.35
	\$13.22	\$6.61
	\$12.20	\$6.10
	\$14.23	\$7.12
	\$13.47	\$6.74
	\$13.22	\$6.61
	\$15.00	\$7,50
	\$12.45	\$6.23
	\$13.22	\$6.61
	\$12.71	\$6.35
	\$10.37	\$5.18
	\$0.51	\$0.26
	\$0.51	\$0.26
	\$0.51	\$0.26
	\$7.37	\$3.69
	\$0.20	\$0.10
	\$0.18	\$0.09

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label Performance	Earning Entity
Title Artist Album Label Performance Value	Share
\$2.29	\$1.14
\$0.76	
\$1.27	
\$12.20 \$2.20	
\$2.29	\$1.14
\$0.76	\$0.38
\$0.20	\$0.10
\$0.20	\$0.10
\$0.16	\$0.08
\$0.04	\$0.02
\$5.08	\$2.54
\$5.08 \$0.51 \$7.78	
\$7.88	
\$5.34	
\$2.03	\$1.02
\$12.45 \$0.25	
\$0.25	\$0.13
\$0.76	\$0.38
\$0.18	\$0.09
\$0.29	\$0.15
\$0.16	\$0.08
\$6.86	\$3.43
\$3.56	
\$3.30	
\$3.56	\$1.78
\$0.16 \$6.86 \$3.56 \$3.56 \$3.56 \$0.29	\$0.15
\$0.16	\$0.08

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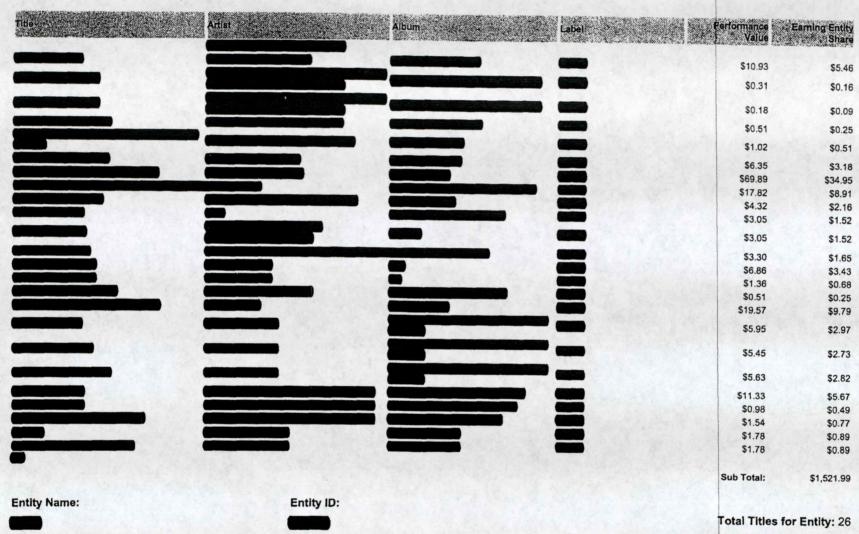
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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**



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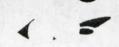


EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity Share
B	\$0.20	\$0.10
	\$0.22	
	\$0.29	
	\$0.25	
	\$0.36	
	\$0.54	\$0.27
	\$0.09	\$0.04
	\$0.18	\$0.09
	\$0.09	\$0.04
	\$0.16	\$0.08
	\$0.09	\$0.04
	\$0.13	\$0.07
	\$3.05	\$1.52
	\$0.16	\$0.08
	\$0.11	\$0.06
	\$0.09	\$0.04
	\$0.20	\$0.10
지원 사람들은 사람들이 있다면 보고 보고 있다면 보고 있다면 이 등을 하는데 되었다면 보고 있다면 보고 있다면 보고 있다.	\$1.52	\$0.76
	\$0.16	\$0.08
	\$0.13	\$0.07



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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title - Self-Village St. Artist Asset 1.	Album Label 1	Performance Value	Earning Entity Share
		\$0.16	\$0.08
		\$0.13	\$0.07
		\$1.27	\$0.64
		\$1.27	\$0.64
		\$0.09	\$0.04
		\$0.18	\$0.09
		Sub Total:	\$5.56
Entity Name:	Entity ID:		
		Total Titles	for Entity: 2
Title 1. Artist	Album Label	Performance Value	Earning Entity Share
		\$2.54	\$1.27
		\$1.02	\$0.51
		Sub Total:	\$1.78
Entity Name:	Entity ID:		
		Total Titles f	or Entity: 28
Title Artist &	Album Per Label	Ferformance Value	Earning Entity Share
		\$1.74	\$0.87
		\$4.94 \$5.03	\$2.47 \$2.52
		\$5.12	\$2.52

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

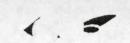
Title Affist Album Label.	Performance Value	Earning Entity
	\$4.68	
그 그 그 그 그 그 그는 그는 그는 그는 그는 그는 그는 그는 그는 그	\$5.03	
	\$6,36	
	\$2.26	
	\$10.86	
	\$4.33	
	\$10.86	
	\$2.54	
	\$13.69	
	\$34.22	
	\$2.47	
	\$3.53	
	\$2.29	
	\$1.68	\$0.84
	\$5.30	\$2.65
	\$5.38	\$2.69
	\$6.18	\$3,09
	\$4.85	\$2.43
	\$5.03	\$2.52
	\$5.03	\$2.52
	\$5.34	\$2.67
	\$0.51	\$0.25
	\$1.14	\$0.57
	\$0.76	\$0.38
	Sub Total:	\$80.58

Entity Name:	Entity ID:	
		Total Titles for Entity: 5

Title	Artist	Albūm	Label	Performance Ea	ming Entity Share
Management of the Control of the Con	STATE TO SECURE AND ASSESSED TO SECURE ASSESSED TO SECURE ASSESSED.	Victoria Contraction and Contraction of the Contrac	Coco-Cransulana Caraca Santa Caraca C	240 04	CO 40
				\$18.81	\$9.40
	THE TAXABLE DESCRIPTION OF THE PARTY OF THE			\$0.25	\$0.13
				\$6.86	\$3.43
				\$6.86	\$3.43

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### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

Title 18 Album Labe)	rformance E. Value	arning Entity Share
	\$5.59	\$2.80

Sub Total: \$19.19

**Entity Name:** 

Entity ID:

**Total Titles for Entity: 8** 

Title Const Attest	Performance E	Earning Entity
Laper Control of the	Value	Share
	\$20.84	\$10,42
	\$0.76	\$0.38
	\$0.25	\$0.13
	\$0.96	\$0.48
	\$1.10	\$0.55
: Carrier : 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1	\$53.88	\$26.94
	\$8.64	\$4.32
/ Carrier 18 18 18 18 18 18 18 18 18 18 18 18 18	\$3.05	\$1.52
	Sub Total:	\$44.74

Entity ID: **Entity Name:** 

Total Titles for Entity: 2

Title : Live : Arlist Album Label	Performance Ea	arning Entity Share
	\$4.83	\$2.41
	\$5.85	\$2.92
	Sub Total:	\$5.34

**Entity Name:** 

Entity ID:

Total Titles for Entity: 5

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

Title Artist Album Label	Performance E Value	Earning Entity Share
	\$8.47	\$4.24
	\$8.47	\$4.24
	\$8.83	\$4,41
	\$14.83	\$7.41
	\$8.65	\$4.32
: [1] [1] [1] [1] [1] [1] [1] [1] [2] [2] [2] [2] [2] [2] [2] [2] [2] [2		
	Sub Total:	\$24.63

**SDARS Ephemeral** 

Period: Jul 2004 - Dec 2004

**Entity Name:** 

Entity ID:

Total Titles for Entity: 785

Title Artist Album Eabel	Performance Value	Earning Entity Share
	\$0.10	
	\$0.12	
	\$0.14	
	\$0.14	\$0.14
: (Company of the State of the	\$0.12	
	\$0.07	\$0.07
	\$0.24	\$0.24
	\$0.07	\$0.07
	\$0.19	\$0.19
	\$0.12	\$0.12
	\$0.17	\$0.17
	\$0.22	\$0.22
	\$0.12	\$0.12
	\$0.10	\$0.10
	\$0.19	\$0.19
	\$0.60	\$0.60
	\$1.27	\$1.27
	\$0.73	\$0.73
	\$1.44	\$1.44
	\$0.05	\$0.05

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance E Value	Earning Entity Share
	\$0.36	
	\$0.36	\$0.36 \$0.14
	\$0.36	\$0.36
이 그는 그는 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그	\$0.31	\$0.31
	\$2.76	\$2.76
	\$0.10	\$0.10
	\$0.12	\$0.12
	\$0.24	\$0.24
20	\$0.10	\$0.10
	\$0.10	\$0.10
	\$0.10	\$0.10
	\$0.79	\$0.79
	\$0.24	\$0.24
	\$1.23	\$1.23
	\$1.32	\$1.33
	\$0.35	\$0.35
	\$0.29	\$0.29
45	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.22	\$0.22
	\$0.10	\$0.10
	\$0.46	\$0.46
	\$0.02	\$0.02
	\$0.17	\$0.17
	\$0.12	\$0.12
D	\$2.07	\$2.06
	\$0.74	\$0.75
4	\$0.96	\$0.96
	\$0.12	\$0.12
	\$1.04	\$1.04
	\$0.07	\$0.07
	\$0.55	\$0.55
	\$0.73	\$0.73
	\$0.10	\$0.10

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album s Label	Performance Value	Share
	\$0.24	\$0.24
	\$0.66	\$0.66
	\$0.05	\$0.05
	\$0.46	\$0.46
	\$0.31	\$0.31
	\$1.03	\$1.03
	\$0.22	\$0.22
	\$0.94	\$0.94
[1] 《프로프트 : 10 12 12 13 13 13 13 14 15 15 15 15 15 15 15 15 15 15 15 15 15	\$0.24	
[1] [1] [1] [1] [1] [1] [1] [1] [1] [1]	\$0.29	\$0.29
[1] Carrier of the property of	\$0.19	
	\$0.26	\$0.26
	\$0.19	\$0.19
	\$0.34	\$0.34
	\$0.19	\$0.19
	\$0.48	\$0.48
	\$0.43	\$0.43
	\$0.07	\$0.07
	\$0.36	\$0.36
	\$0.36	\$0.36
	\$0.22	
	\$0.72	
	\$0.05	\$0.05
	\$0.26	\$0.26
	\$0.14	\$0.14
	\$0.12	\$0.12
	\$0.29	\$0.29
	\$0.34	\$0.34
	\$0.19	\$0.19
	\$0.19	\$0.19
	\$0.22	\$0.22

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### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title: Label	Performance	Earning Entity
Control Contro	Value	Share
	\$0.50	\$0.50
	\$0.07	\$0.07
	\$0.62	\$0.62
	\$0.41	\$0.41
	\$0.31	\$0.31
	\$0.22	\$0.22
	\$0.48	\$0.48
	\$0.43	\$0.43
	\$0.55	\$0.55
	\$0.50	\$0.50
	\$0.02	\$0.02
	\$0.46	\$0.46
	\$0.05 \$0.58	\$0.05
		\$0.58
	\$0.68	\$0.67
	\$0.53	\$0.53
	\$1.30	\$1.30
	\$2.47	\$2.47
	\$0.31	\$0.31
	\$0.50	\$0.50
	\$0.10	\$0.10
	\$0.42	\$0.42
	\$1.27	\$1.27
	\$1.74	\$1.74
	\$3.14	\$3.14
	\$1.01	\$1.01
	\$0.74	\$0.75
	\$2.38	\$2.38
	\$0.49	\$0.48
	\$2.69	\$2.68
	\$0.10	\$0.10

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### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity Share
	\$4.16	\$4.16
	\$0.05	\$0.05
	\$0.07	\$0.07
	\$0.76	\$0.76
	\$0.82	\$0.82
	\$0.46	\$0.46
[전 <mark></mark>	\$0.12	\$0.12
[2] [4] [4] [4] [4] [4] [4] [4] [4] [4] [4	\$0.72	\$0.72
[18] [18] [18] [18] [18] [18] [18] [18]	\$0.87	\$0.87
	\$0.02	\$0.02
[1]	\$1.47	\$1.47
	\$1.95	\$1.95
이	\$2.60	\$2.60
	\$2.84	\$2.84
	\$1.24	\$1.24
	\$0.02	\$0.02
	\$0.89	\$0.89
	\$1.15	\$1.15
	\$0.02	\$0.02
	\$2.57	\$2.57
[1] - [1] -	\$2.38	\$2.38
	\$0.07	\$0.07
	\$0.58	\$0.58
	\$2.28	\$2.28
	\$1.44	\$1.44
	\$0.24	\$0.24
	\$0.10	\$0.10
	\$0.38	\$0.38
	\$0.02	\$0.02
	\$0.10	\$0.10
	\$0.07	\$0.07
	\$0.81	\$0.81
	\$0.65	\$0.65

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance I Value	Earning Entity Share
	\$0.58	\$0.58
	\$0.22	\$0.22
	\$0.34	\$0.34
		\$0.54
	\$0.31	\$0.31
	\$0.22	\$0.22
	\$0.46	\$0.46
	\$3.23	\$3.22
	\$4.08	\$4.08
	\$0.31	\$0.31
	\$0.41	\$0.41
	\$0.38	\$0.38
	\$2.27	\$2.28
	\$0.10	\$0.10
	\$0.07	\$0.07
	\$0.91	\$0.91
	\$0.99	\$0.99
	\$0.96	\$0.96
	\$0.43	\$0.43
	\$1.06	\$1.06
[2]	\$2.74	\$2.74
	\$1.92	\$1.92
	\$0.12	\$0.12
	\$2.07	\$2.07
	\$0.58	\$0.58
	\$2.69	\$2.69
	\$1.95	\$1.95
	\$0.17	\$0.17
	\$0.12	\$0.12
	\$0.14	\$0.14
	\$0.10	\$0.10

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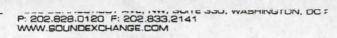
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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album (Label	Performance Value	Earning Entity Share
	\$0.31	\$0.31
	\$2.02	\$2.03
	\$0.43	\$0.43
	\$2.52	\$2.52
	\$13.55	\$13.55
	\$6.84	\$6.84
	\$0.07	\$0.07
	\$0.31	\$0.31
	\$0.02	\$0.02
	\$0.07	\$0.07
· (CONTROL OF THE PROPERTY OF	\$0.17	\$0.17
	\$0.14	\$0.14
	\$0.07	\$0.07
	\$0.14	\$0.14
	\$0.07	\$0.07
	\$0.10	\$0.10
	\$0.22	\$0.22
	\$5.90	\$5.90
	\$1.32	\$1.32
	\$0.24	\$0.24
	\$6.08	\$6.08
	\$0.22	\$0.22
	\$0.05	\$0.05
	\$2.22	\$2.22
	\$0.29	\$0.29
	\$4.23	\$4.23
	\$0.48	\$0.48
	\$0.10	\$0.10
	\$1.71	\$1.71
	\$0.12	\$0.12
	\$0.62	\$0.62
	\$0.29	\$0.29



### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title + Cr. Artist Album Label a	Performance Value	Earning Entity Share
[1]	\$0.07	
	\$3.84	\$3.84
	\$0.10	\$0.10
	\$0.94	
	\$0.18	
	\$0.48	
	\$1.39	
	\$1.32	
	\$0.53	
	\$0.02	
	\$0.82	
	\$0.19	
	\$0.22	
	\$1.32	\$1.32
	\$0.22	\$0.22
성 <b></b>	\$0.24	
네	\$0.03	\$0.03
	\$0.03	\$0.03
	\$2.89	
	\$3.60	
	\$0.03	\$0.03
	\$0.05	\$0.05
	\$0.12	\$0.12
	\$0.17	\$0.17
[1]	\$0.51	\$0.51
	\$0.07	\$0.07
	\$0.02	\$0.02
	\$0.02	
	\$0.02	
	\$1.39	\$1.39
	\$0.34	\$0.34
	\$0.19	\$0.19
	\$0.14	
	\$0.14	\$0.14

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity Share
	\$1.90	
	\$2.21	\$2.21
	\$0.53	\$0.53
	\$0.29	\$0.29
	\$0.07	\$0.07
	\$0.05	\$0.05
	\$0.24	
	\$0.14	\$0.14
	\$0.14	\$0.14
	\$0.14	\$0.14
	\$0.19	\$0.19
	\$0.10	\$0.10
	\$0.22	\$0.22
	\$0.26	\$0.26
	\$0.41	\$0.41
	\$0.05	\$0.05
	\$3.77	\$3.77
	\$0.08	\$0.08
	\$0.19	\$0.19
	\$0.14	\$0.14
	\$0.19	\$0.19
	\$0.50	\$0.50
	\$0.84	\$0.84
	\$0.60	\$0.60
	\$0.31	\$0.31
	\$0.36	\$0.36
	\$0.14	\$0.14
	\$0.10	\$0.10
	\$0.10	\$0.10
	\$0.20	\$0.20
	\$0.05	\$0.05

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album s Label	Performance	Earning Entity
The state of the s	Value	
	\$0.02	\$0.02
	\$0.07	\$0.07
	\$0.02	\$0.02
	\$0.79	\$0.79
	\$0.07	\$0.07
	\$0.07	\$0.07
	\$0.05	\$0.05
	\$0.07	\$0.07
	\$4.52	\$4.52
	\$0.34	\$0.34
	\$0.10	\$0.10
	\$0.02	\$0.02
	\$0.17	\$0.17
	\$0.02	\$0.02
	\$0.02	\$0.02
	\$0.02	\$0.02
	\$0.10	\$0.10
	\$0.12	\$0.12
	\$0.10	\$0.10
	\$0.07	\$0.07
	\$0.07	\$0.07
	\$0.05	\$0.05
	\$0.10	\$0.10
5	\$1.93	\$1.93
게 그 그 그 그는 이 회사들은 얼마나 되었다. 그는 그는 그는 그는 그는 그는 그는 그를 보고 있다. 그는 그를 보고 있다. 그는 그를 보고 있다.	\$0.19	\$0.19
	\$2.35	\$2.34
	\$0.22	\$0.22
	\$2.66	\$2.66
에 프로마트 프랑스 아이트 아이트 아이트 프로마트 아이트 아이트 아이트 아이트 아이트 아이트 아이트 아이트 아이트 아이	\$0.22	\$0.22
	\$2.99	\$2.99
	\$0.12	\$0.12
	\$0.14	\$0.14
	\$0.12	\$0.12
	\$0.17	\$0.17
	\$0.65	\$0.65

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### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance E Value	Earning Entity Share
	\$0.60	\$0.60
	\$0.43	\$0.43
	\$0.08	\$0.08
	\$2.17	\$2.17
1 (	\$0.38	\$0.38
	\$1.65	\$1.65
	\$0.19	\$0.19
	\$1.70	\$1.70
	\$0.43	\$0.43
	\$0.17	\$0.17
	\$0.05	\$0.05
	\$0.19	\$0.19
	\$0.38	\$0.38
	\$1.62	\$1.62
	\$2.53	\$2.53
	\$2.58	\$2.58
	\$0.14	\$0.14
	\$0.14	\$0.14
	\$0.17	\$0.17
	\$0.19	\$0.19
	\$0.14	\$0.14
	\$0.12	\$0.12
	\$0.70	\$0.70
	\$0.19	\$0.19
	\$0.50	\$0.50
	\$0.05	\$0.05
	\$0.08	\$0.08
	\$0.10	\$0.10
	\$0.02	\$0.02
	\$2.20	\$2.20
	\$0.50	\$0.50

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EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Label . Label .	Performance Value	Earning Entity Share
	\$1.87	\$1.87
	\$0.03	\$0.03
	\$0.05	\$0.05
	\$0.05	
	\$0.05	
그 사람들은 사람들은 사람들은 사람들은 사람들은 사람들이 되었다. 그는 사람들은 사람들은 사람들이 되었다.	\$0.17	***************************************
	\$0.02 \$0.10	
	\$0.10	
	\$0.02	\$0.03
	\$0.07	\$0.07
	\$0.19	\$0.19
	\$0.02	\$0.02
	\$0.12	\$0.12
	\$1.70	\$1.70
	\$0.05	\$0.05
	\$0.02	\$0.02
	\$1.01	\$1.01
	\$0.34	\$0.34
	\$0.14	\$0.14
	\$7.07	\$7.07
	\$3.17	\$3.17
	\$0.17	\$0.17
	\$0.07	\$0.07
	\$0.76	\$0.76
	\$0.10	\$0.10
	\$0.02	\$0.02
	\$0.22	\$0.22
	\$0.02	\$0.02
	\$0.31	\$0.31

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#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

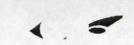
Title	Artist	Album	Label'

Performance E Value	aming Entity Share
\$0.29	\$0.29
\$0.02	\$0.02
\$0.02	\$0.02
\$1.77	\$1.77
\$10.87	\$10.87
\$0.05	\$0.05
\$0.07	\$0.07
\$0.05	\$0.05
\$1.09	\$1.09
\$0.05	\$0.05
\$2.09	\$2.09
\$0.02	\$0.02
\$7.52	\$7.52
\$6.61	\$6.61
\$0.02	\$0.02
\$0.29	\$0.29
\$0.05	\$0.05
\$0.67	\$0.67
\$10.79	\$10.79
\$1.11	\$1.11
\$0.22	\$0.22
\$2.84	\$2.84
\$8.76	\$8.76
\$4.89	\$4.89
\$4.97	\$4.97
\$0.10	\$0.10
\$1.18	\$1.18
\$0.79	\$0.79
\$0.62	\$0.62
\$0.10	\$0.10
\$0.02	\$0.02
\$0.34	\$0.34

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title ( Antist ) Album Label .	Performance Value	Earning Entity Share
	\$1.77	\$1.77
	\$0.07	\$0.07
	\$1.80	\$1.80
	\$0.03	\$0.03
	\$0.34	\$0.34
	\$0.05	
	\$0.72	7.515.5
	\$0.05	
	\$0.05	\$0.05
	\$8.53	
	\$0.07	\$0.07
	\$0.03	\$0.03
	\$1.99	\$1.99
	\$0.05	\$0.05
	\$0.02	\$0.02
	\$4.88	
	\$0.07	\$0.07
	\$0.02	\$0.02
	\$0.02	\$0.02
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.03	\$0.03
	\$0.02	\$0.02
H	\$0.48	\$0.48
	\$1.72	\$1.72
	\$0.05	\$0.05
	\$1.75	\$1.75
	\$0.17	\$0.17
	\$4.56	\$4.56

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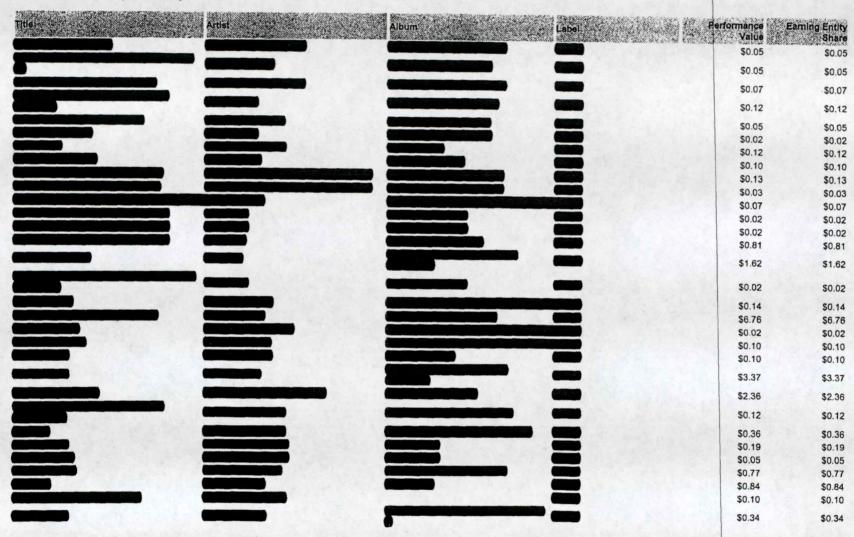


# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title's Artist Album + Label	Performance E Value	aming Entity Share
	\$2.93	\$2.93
	\$0.05	\$0.05
	\$0.02	\$0.02
	\$0.10	\$0.10
	\$0.14	\$0.14
	\$0.05	\$0.05
	\$0.48 \$0.07	\$0.48
	\$0.24	\$0.07 \$0.24
	\$0.02	\$0.02
	\$0.12 \$0.14	\$0.12 \$0.14
	\$0.60	\$0.60
	\$0.07	\$0.07
	\$1.62	\$1.62
	\$5.12	\$5.12
	\$1.77	\$1.77
	\$0.03	\$0.03
	\$0.34	\$0.34
	\$0.03	\$0.03
	\$0.02	\$0.02
	\$0.03	\$0.03
	\$5.86	\$5.86
	\$1.47	\$1.47
	\$0.94	\$0.94
	\$0.05	\$0.05
	\$0.43	\$0.43
	\$0.10	\$0.10

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS



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EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title Artist Album Label	Performance	Earning Entity
	Value \$1.60	Share
	\$25.88	\$1.60 \$25.88
	\$1.39	\$1.39
	\$0.03	\$0.03
	\$1.60	\$1.60
	\$0.07	\$0.07
(	\$0.76	\$0.76
	\$0.10	\$0.10
	\$1.70	\$1.70
	\$1.72	\$1.72
	\$0.02	\$0.02
	\$0.17	\$0.17
	\$0.02	\$0.02
	\$0.15	\$0.15
	\$1.52	\$1.52
	\$12.88	\$12.88
5	\$0.33	\$0.33
	\$1.75	\$1.75
	\$2.31	\$2.31
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.02	\$0.02
나는	\$0.05	\$0.05
	\$6.44	\$6.44
	\$0.12	\$0.12
	\$0.03	\$0.03
	\$0.05	\$0.05
	\$1.67	\$1.67
	\$0.05	\$0.05
	\$0.19	\$0.19

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### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Airtist Album Label	Performance Value	Earning Entity Share
THE PROPERTY OF THE PROPERTY O	\$2.38	\$2.38
	\$0.07	\$0.07
	\$0.24	\$0.24
	\$0.02	\$0.02
	\$0.02	\$0.02
. I	\$0.02	\$0.02
	\$2.41	\$2.41
- 1	\$0.10	\$0.10
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.12	\$0.12
	\$0.26	\$0.26
	\$0.29	\$0.29
	\$1.95	\$1.95
	\$2.36	\$2.36
	1.00	
	\$0.19	\$0.19
	\$0.05	\$0.05
	\$0.14	\$0.14
	\$0.07	\$0.07
이 그 그 그는 이 이 이 가는 보세요.	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.38	\$0.38
[1]	\$0.55	\$0.55
	\$0.05	\$0.05
	\$2.72	\$2.72
	\$0.05	\$0.05
	\$0.03	\$0.03
	\$0.03	\$0.03
	\$0.12	\$0.12
	\$0.12	\$0.12
	\$0.10	\$0.10

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity Share
	\$0.02	\$0.02
	\$0.05	\$0.05
	\$0.03	\$0.03
	\$1.75	\$1.75
	\$0.19	\$0.19
	\$1.70	\$1.70
	\$0.26	\$0.26
	\$0.05	\$0.05
	\$0.14	\$0.14
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.02	\$0.02
	\$0.05	\$0.05
	\$0.10	\$0.10
	\$1.70	\$1.70
	\$0.05	\$0.05
	\$0.02	\$0.02
	\$0.34	\$0.34
	\$0.34	\$0.34
	\$0.22	\$0.22
	\$0.05	\$0.05
	\$0.53	\$0.53
	\$0.12	\$0.12
	\$1.57	\$1.57
	\$0.02	\$0.02
	\$0.12	\$0.12
	\$0.17	\$0.17
	\$0.24	\$0.24
	\$1.67	\$1.67
	\$0.13	\$0.13
	\$0.10	\$0.10

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Title Artist Album Label Per	rformance Value	Earning Entity Share
	\$0.05	\$0.05
	\$0.02	\$0.02
	\$0.31	\$0.31
	\$0.82	\$0.82
	\$0.05	\$0.05
	\$0.10	\$0.10
1	\$0.05	\$0.05
	\$0.25	\$0.25
	\$1.52	\$1.52
	\$0.05	\$0.05
	\$0.03	\$0.03
	\$0.14	\$0.14
	\$0.68	\$0.68
	\$0.05	\$0.05
	\$0.10	\$0.10
	\$0.10	\$0.10
	\$1.01	\$1.01
	\$0.14	\$0.14
	\$0.14	\$0,14
	\$0.14	\$0.14
	\$0.26	\$0.26
	\$0.05	\$0.05
	\$4.33	\$4.33
	\$1.67	\$1.67
	\$0.05	\$0.05
	\$1.67	\$1.67
	\$0.17	\$0.17

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

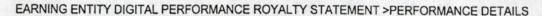
Title Artist Album Label Perfo	rmance Value	Earning Entity Share
	\$0.12	\$0.12
	\$0.02	\$0.02
의 프로그램 보고 그리는 경기 회사 회사 프로그램 프로그램 프로그램 프로그램 프로그램 프로그램 프로그램 프로그램	\$0.43	\$0.43
[2] [2] [2] [2] [2] [2] [2] [2] [2] [2]	\$0.10	\$0.10
	\$1.77	\$1.77
	\$0.05	\$0.05
	40.00	Ψ0.03
	\$0.05	\$0.05
	\$0.03	\$0.03
	\$0.02	\$0.02
	\$0.48	\$0.48
	\$0.24	\$0.24
	\$0.89	\$0.89
	\$1.39	\$1.39
	\$0.53	\$0.53
	\$0.72	\$0.72
	\$0.58	\$0.58
	\$0.19	\$0.19
	\$1.13	\$1.13
	\$0.05	\$0.05
	\$0.07	\$0.07
	\$0.02	\$0.02
	\$0.22	\$0.22
	\$0.12	\$0.12
[ [	\$1.93	\$1.93
	\$14.63	\$14.63
	\$0.22	\$0.22
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$3.17	\$3.17
	\$0.03	\$0.03

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EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Album Label	Performance Value	Earning Entity Share
	\$3.01	\$3.01
	\$0.50	\$0.50
	\$0.17	\$0.17
	\$0.22	\$0.22
	\$0.10	\$0.10
	\$4.66	\$4.66
	\$0.02	\$0.02
	\$0.02	\$0.02
	\$0.05	\$0.05
	\$1.72	\$1.72
	\$0.22	\$0.22
	\$0.23	\$0.23
	\$0.89	\$0.89
	\$0.07	\$0.07
	\$1.97	\$1.97
	\$0.34	\$0.34
	\$0.15	\$0.15
: Barrier -	\$0.02	\$0.02
	\$1.75	\$1.75
	\$2.31	\$2.31
	\$0.08	\$0.08
	\$1.77	\$1.77
	\$0.41	\$0.41
	\$0.24	\$0.24
	\$0.17	\$0.17
	\$1.70	\$1.70
	\$2.25	\$2.25
	\$1.70	\$1.70
	\$0.02	\$0.02
	\$0.02	\$0.02
	\$3.98	\$3.98

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Cabel , P	erformance Value	Earning Entity Share
Same and the same of the same	\$0.05	
	\$4.79	
	\$1.80	
	\$2.38	
	\$0.10 \$0.14	
	\$0.14	4.54
	\$1.20	
	\$0.02	
	\$0.02	
	\$0.03	\$0.03
	\$0.41	\$0.41
	\$0.07	\$0.07
	\$1.60	
	\$1.57	\$1.57
	\$0.02	\$0.02
	\$0.23	\$0.23
	\$0.05	\$0.05
	\$3.75	\$3.75
	\$2.48	\$2.48
	\$2.43	\$2.43
	\$0.34	\$0.34
	\$0.31	\$0.31
	\$0.05	
		\$0.05
	\$0.03	\$0.03
	\$1.13	\$1.13
	\$1.75	\$1.75
	\$0.02	\$0.02
	\$0.29	\$0.29
	\$0.02	\$0.02
	\$0.24	\$0.24

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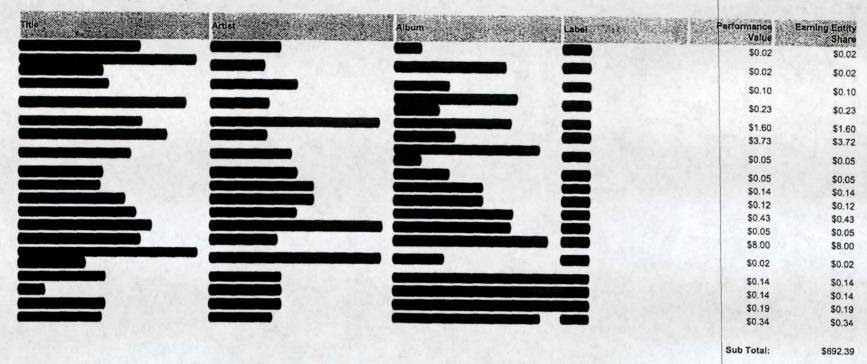
EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity Share
	\$0.05	\$0.05
	\$4.66	\$4.66
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.14	\$0.14
	\$0.10	\$0.10
	\$5.07	\$5.07
	\$0.23	\$0.23
	\$0.05	\$0.05
	\$5.33	\$5.33
	\$1.82	\$1.82
	\$0.17	\$0.17
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$11.96	\$11.96
	\$8.39	\$8.39
등 하다는 사람들이 보고 있는 사람들이 되었다. 그 사람들이 되었다면 하는 사람들이 되었다면 하는 것이 되었다. 그는 사람들이 다른 사람들이 되었다면 하는 것이다면 하	\$0.03	\$0.03
	\$0.02	\$0.02
	\$0.05	\$0.05
	\$0.02	\$0.02
	\$0.10	\$0.10
	\$1.80	\$1.80
	\$0.10	\$0.10
	\$9.92	\$9.92
	\$0.65	\$0.65
	\$2.91	\$2.91
	\$0.07	\$0.07
	\$1.75	\$1.75
	\$0.02	\$0.02
	\$0.07	\$0.07
	\$2.41	\$2.41
	\$0.02	\$0.02

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

### **Current Distribution (Continued)**



**Entity Name:** 

Entity ID:

			Descrision in the property of the contract of		
Title	Artist	Album	Label	rformance Value	Earning Entity
		Manager and the second	and the second s	e Value	Share
				\$0.12	\$0.12
				\$0.29	\$0.29
				\$0.26	\$0.26
				\$0.36	\$0.36
AND STREET, STATE OF THE STATE OF	<b>一种种种种种种种种种种种种种种种种种种种种种种种种种种种种种种种种种种种种</b>			\$0.19	\$0.19

Total Titles for Entity: 47

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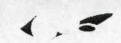
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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity Share
	\$0.29	\$0.29
	\$0.14	\$0.14
	\$0.19	\$0.19
	\$0.12	\$0.12
	\$0.10	\$0.10
	\$1.34	\$1.34
	\$0.05	\$0.05
	\$0.12	\$0.12
	\$0.19	\$0.19
	\$0.19	\$0.19
	\$0.10	\$0.10
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.10	\$0.10
	\$0.05	\$0.05
	\$0.12	\$0.12
	\$0.19	\$0.19
	\$0.24	\$0.24
	\$0.34	\$0.34
	\$0.46	\$0.46
1	\$0.67	\$0.67
	\$0.36	\$0.36
	\$0.05	\$0.05
	\$0.02	\$0.02
	\$0.19	\$0.19
	\$0.19	\$0.19
	\$0.02	\$0.02
	\$0.10	\$0.10
	\$0.17	\$0.17
	\$0.12	\$0.12
	\$0.07	\$0.07
	\$0.17	\$0.17

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

Titler Album Label	Performance Value	Earning Entity
The state of the s	DOMESTICAL S	Share
	\$0.87	\$0.87
	\$0.05	\$0.05
	\$0.36	\$0.36
	\$0.24	\$0.24
	\$0.02	\$0.02
	\$0.38	\$0.38
	\$0.31	\$0.31
	\$0.07	\$0.07
	\$0.22	\$0.22
	\$0.29	\$0.29
	Sub Total:	\$10.59

**Entity Name:** 

Entity ID:

Total Titles for Entity: 50

Title Album Label	Performance Value	Earning Entity Share
	\$0.07	\$0.07
	\$0.07	\$0.07
	\$0.07	\$0.07
	\$0.07	\$0.07
	\$0.26	\$0.26
	\$0.26	\$0.26
	\$0.26	\$0.26
	\$0.07	\$0.07

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EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title	Artist	Album	Label P	erformance Value	Earning Entity Share
				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.02	\$0.02
10.00				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.02	\$0.02
			78 78	\$0.02	\$0.02
				\$0.02	\$0.02

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title	Artist	Album	Label P	reiformance Ea Value	arning Entity Share
				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.14	\$0.14
				\$0.14	\$0.14
				\$0.02	\$0.02
				\$0.17	\$0.17
				\$0.02	\$0.02
				\$0.14	\$0.14
				\$0.14	\$0.14
				\$0.02	\$0.02
				\$0.14	\$0.14
				\$0.14	\$0.14
				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.02	\$0.02
				\$0.05	\$0.05
				\$0.05	\$0.05
				\$0.05	\$0.05
				\$0.05	\$0.05
				\$0.14	\$0.14

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Total Titles for Entity: 167

# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

Title Artist Album Label,	Performance Ean Value	ning Entity
	\$0.14	\$0.14
	\$0.14	\$0.14
	\$0.14	\$0.14
	\$0.02 \$0.02	\$0.02 \$0.02
	Sub Total:	\$3.60

**Entity Name:** 

Entity ID:

Title Artist Album Label	Performance Value	Earning Entity Share
	\$0.60	
	\$0.05	\$0.05
	\$0.31	\$0.31
	\$0.99	
	\$0.55	
	\$0.10	2,000,000
	\$0.05	
	\$0.10	\$0.10
	\$0.10	
	\$0.10	\$0.10
	\$0.14	\$0.14
	\$0.12	\$0.12
	\$0.22	\$0.22
	\$0.24	\$0.24
	\$0.19	\$0.19
	\$0.24	\$0.24
	\$0.19	\$0.19
	\$0.26	\$0.26

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### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Titles Artist Album . Label Po	rformance Value	Earning Entity Share
	\$0.22	\$0.22
	\$0.22	\$0.22
	\$0.22	\$0.22
그 이 경우 이 사는 사람들이 되었다.	\$0.24	\$0.24
	\$0.02	\$0.24
	\$0.26	\$0.02
	\$0.34	\$0.34
	\$0.61	\$0.61
	\$0.82	\$0.82
	\$0.22	\$0.22
	\$0.80	\$0.80
	\$0.26	\$0.26
	\$0.55	\$0.55
	\$0.36	\$0.36
	\$0.84	\$0.84
	\$0.60	\$0.60
	\$0.46	\$0.46
	\$0.31	\$0.31
	\$0.55	\$0.55
	\$1.06	\$1.06
	\$0.38	\$0.38
	\$0.02	\$0.02
	\$0.53	\$0.53
	\$0.41	\$0.41
	\$0.53	\$0.53
	\$2.38	\$2.38
(프로그램	\$0.46	\$0.46
	\$0.41	\$0.41
	\$1.06	\$1.06
	\$0.58	\$0.58
	\$0.46	\$0.46
	\$0.53	\$0.53
	\$0.53	\$0.53
	\$0.79	\$0.79
	\$1.15	\$1.15

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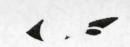
## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

	Street, Street Co.	State of National States and the state of th
Title Album Cabel	Performance Value	
	\$1.03	Share
	\$0.26	\$1.03 \$0.26
	\$1.03	\$1.03
	\$1.23	\$1.23
	\$0.77	\$0.77
	\$0.02	\$0.02
	\$1.71	\$1.71
	\$0.62	
	\$0.62	\$0.62
	\$0.15	\$0.19 \$0.65
	\$0.02	\$0.02
	\$0.05	\$0.05
	\$0.72	\$0.72
	\$1.23	\$1.23
	\$0.62	\$0.62
	\$0.02	\$0.02
	\$0.05	\$0.05
	\$0.46	\$0.46
	\$0.60	\$0.60
	\$0.05	\$0.05
	\$0.60	\$0.60
	\$0.05	\$0.05
	\$0.62	\$0.62
	\$0.29	\$0.29
	\$0.34	\$0.34
	\$0.70	\$0.70
1 - HERRICH STAR MARKET - STAR STAR STAR STAR STAR STAR STAR STAR	\$0.62	\$0.62
	\$0.50	\$0.50
	\$0.55	\$0.55
	\$0.55	\$0.55
	\$0.07	\$0.07
	\$0.17	\$0.17

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

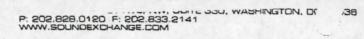
Title	Artist	Album Cabel	Performance Value	Earning Entity Share
			\$0.02	\$0.02
			\$0.05	\$0.05
			\$0.05	\$0.05
	All the first of the second		\$0.02	\$0.02
Date State of Principles			\$0.12	\$0.12
			\$0.10	\$0.10
			\$0.19	\$0.19
			\$0.14	\$0.14
-44-57 OH-41-0-11-45			\$0.29	\$0.29
			\$0.26	\$0.26
			\$0.10	\$0.10
			\$0.13	\$0.12
			\$0.29	\$0.29
			\$0.22	\$0.22
			\$0.50	\$0.50
			\$0.19	\$0.19
	八 不 于 是 一		\$0.02	\$0.02
			\$0.43	\$0.43
			\$0.14	\$0.14
			\$0.25	\$0.25
			\$0.10	\$0.10
			\$0.25	\$0.25
			\$0.68	\$0.68
			\$0.14	\$0.14
			\$0.17	\$0.17
			\$0.17	\$0.17
			\$0.30	\$0.30
The second second second second			\$0.55	\$0.55
			\$15.86	\$15.86

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#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title Artist Albums Label	Performance Value	Eaming Entity Share
The state of the s	\$0.10	\$0.10
[	\$0.26	\$0.26
	\$0.22	\$0.22
	\$0.24	\$0.24
	\$0.24	\$0.24
	\$0.94	\$0.94
	\$0.53	\$0.53
	\$0.17	\$0.17
	\$0.07	\$0.07
	\$0.02	\$0.02
	\$0.22	\$0.22
	\$1.03	\$1.03
	\$0.14	\$0.14
	\$0.94	\$0.94
	\$0.02	\$0.02
	\$0.05	\$0.05
	\$0.53	\$0.53
	\$0.38	\$0.38
	\$0.19	\$0.19
	\$0.07	\$0.07
	\$0.02	\$0.02
	\$0.02	\$0.02
	\$0.22	\$0.22
	\$2.52	\$2.52
	\$0.02	\$0.02
	\$0.89	\$0.89
	\$0.24	\$0.24
	\$0.14	\$0.14
	\$0.22	\$0.22
	\$0.22	\$0.22
	\$0.19	\$0.19
성	\$0.29	\$0.29
	\$0.17	\$0.17
	\$0.26	\$0.26
	\$0.41	\$0.41
	\$0.17	\$0.17





#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

Title	Artist	Album Label	Performance Value	Earning Entity Share
		2009/00/00	\$0.41	\$0.41
			\$0.19	
			Ψ0.13	
			\$0.10	
			\$0.22	\$0.22
	91,41,44 (4) \$10 (5)		\$0.02	
			40.02	\$0.02
			\$0.02	\$0.02
			\$0.02	
			\$0.05	\$0.05
			\$0.05	\$0.05
			\$0.53	\$0.53
			\$0.12	\$0.12
			\$0.24	\$0.24
			\$0.19	\$0.19
			\$0.55	\$0.55
			\$0.14	
			Sub Total:	\$77.31

En	tity	Nan	ne:

#### Entity ID:

#### Total Titles for Entity: 110

Title Afflet Album Label	Performance Ea	ming Entity
	COLUMN TO THE REAL PROPERTY AND ADDRESS OF THE PERSON OF T	
	\$0.07	\$0.07
	\$0.02	\$0.02
	\$0.10	\$0.10
	\$0.14	\$0.14
	\$0.07	\$0.07
	\$0.36	\$0.36
	\$0.12	\$0.12

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#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance E	arning Entity Share
	\$0.48	\$0.48
	\$0.02	\$0.02
	\$0.12	\$0.12
	\$0.10	\$0.10
	\$0.19	\$0.19
	\$0.17	\$0.17
	\$0.17	\$0.17
	\$0.91	\$0.91
	\$0.43	\$0.43
	\$0.67	\$0.67
	\$0.77	\$0.77
	\$0.67	\$0.67
	\$0.72	\$0.72
	\$0.60	\$0.60
	\$0.65	\$0.65
	\$1.52	\$1.52
	\$0.60	\$0.60
	\$0.89	\$0.89
	\$0.48	\$0.48
	\$0.05	\$0.05
	\$0.87	\$0.87
	\$0.17	\$0.17
	\$0.17	\$0.17
	\$0.17	\$0.17
	\$0.17	\$0.17

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

Title Artist Album Label	Performance Value	Earning Entity Share
	\$0.07	\$0.07
	\$0.18	\$0.18
	\$0.07	\$0.07
	\$0.07	\$0.07
	\$0.05	\$0.05
	\$0.14	\$0.14
	\$0.14	\$0.14
	\$0.14	\$0.14
	\$0.10	\$0.10
	\$0.14	\$0.14
	\$0.03	\$0.03
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.31	\$0.31
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.12	\$0.12
	\$0.17	\$0.17
	\$1.39	\$1.39
	\$0.03	\$0.03
	\$0.43	\$0.43
	\$0.03	\$0.03
	\$0.31	\$0.31
	\$1.35	\$1.35

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title Artist Album: Label	Performance Value	Earning Entity Share
	\$0.10	\$0.10
	\$0.31	\$0.31
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.14	\$0.14
	\$0.22	\$0.22
	\$0.10	\$0.10
	\$0.29	\$0.29
	\$0.14	\$0.14
	\$0.05	\$0.05
	\$0.10	\$0.10
	\$0,33	\$0.33
	\$0.22	\$0.22
	\$0.07	\$0.07
	\$0.31	\$0.31
	\$0.14	\$0.14
	\$0.14	\$0.14
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	
	30.03	\$0.05

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Eabel P	erformance Value	Earning Entity Share
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.10	\$0.10
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.05	\$0.05
	\$0.38	\$0.38
	\$0.14	\$0.14
	\$0.14	\$0.14
	\$0.02	\$0.02
	\$0.29	\$0.29

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Earning Entity Share

\$0.31

\$1.06

\$0.05

\$0.19

\$0.20

\$0.18

\$0.94

\$0.22

\$0.26

\$0.38

\$26.76

Performance Value \$0.31

\$1.06

\$0.05

\$0.19

\$0.20

\$0.18

\$0.94

\$0.22

\$0.26

\$0.38

Total Titles for Entity: 72

Sub Total:

#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

Title	Artist	Album	Label

**Entity Name:** 

#### Entity ID:

Title Artist Album Label	Performance Ea	rning Entity Share
	\$0.24	\$0.24
	\$0.41	\$0.41
	\$0.24	\$0.24
	\$0.22	\$0.22
	\$0.19	\$0.19
	\$0.38	\$0.38
	\$0.17	\$0.17
	\$0.24	\$0.24
	\$0.26	\$0.26
	\$0.02	\$0.02
	\$0.17	\$0.17
	\$0.02	\$0.02
	\$0.22	\$0.22

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title Arlist Album Lakel	Performance	Earning Entity
Album Label	Value	Share
	\$0.22	\$0.22
	\$0.29	\$0.29
	\$0.34	\$0.34
	\$0.17	\$0.17
	\$0.14	\$0.14
	\$0.17	\$0.17
	\$0.22	\$0.22
4	\$0.19	\$0.19
	\$0.24	\$0.24
	\$0.22	\$0.22
	\$0.10	\$0.10
	\$0.24	\$0.24
	\$0.17	\$0.17
	\$0.12	\$0.12
	\$0.19	\$0.19
	\$0.14	\$0.14
	\$0.22	\$0.22
	\$0.12	\$0.12
	\$0.10	\$0.10
	\$0.17	\$0.17
(1) [1] [1] [1] [1] [1] [1] [1] [1] [1] [1]	\$0.19	\$0.19
	\$0.22	\$0.22
(Barrier	\$0.02 \$0.02	\$0.02
		\$0.02
	\$0.22 \$0.65	\$0.22
	\$0.83	\$0.65
	\$0.14	\$0.34
	\$0.22	\$0.14
	\$0.10	\$0.22
	\$0.10	\$0.10 \$0.10
	\$0.10	
	\$0.07	\$0.07 \$0.07
	\$0.02	\$0.07
	\$0.02	\$0.02
	\$0.05	\$0.05
(BENEZ)	40.00	Ψ0.03

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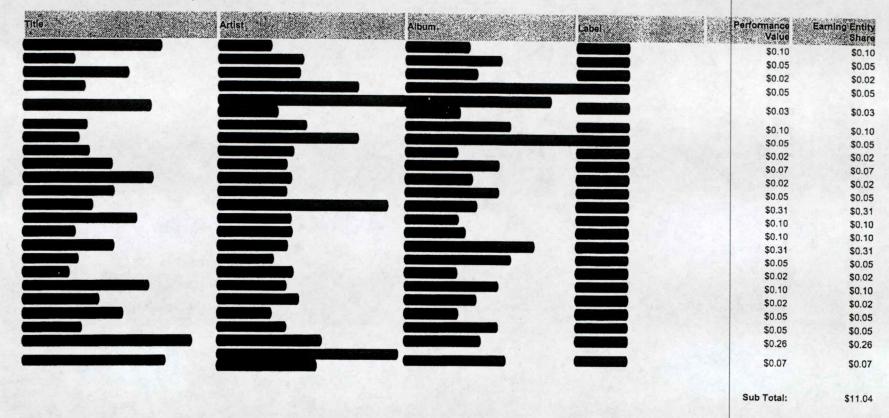
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### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**



**Entity Name:** 

Entity ID:

itle Artist Album Label	Performance E Value	Earning Entity Share
	\$0.60	\$0.60

\$0.17

Total Titles for Entity: 14

\$0.17

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

Title Artist Album Labelt	Performance Value	Earning Entity Share
The state of the s	\$0.96	\$0.96
	\$0.53	
	\$0.51	\$0.51
	\$1.90	\$1.90
	\$0.10	\$0.10
	\$0.03	\$0.03
	\$0.07	\$0.07
	\$0.71	\$0.71
	\$0.10	\$0.10
	\$1.83	\$1.83
	\$1.39	\$1.39
	\$0.05	\$0.05
	Sub Total:	\$8,94

**Entity Name:** 

Entity ID:

Total Titles for Entity: 26

Title - S. S. P. , S. P. J. Artist - Artist - Album Label	erformance Value	Earning Entity
STATE OF THE PROPERTY OF THE P	\$0.41	\$0.41
	\$0.10	\$0.10
	\$0.10	\$0.10
# (1995年 - 1997年 - 1	\$0.12	\$0.12
- 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1	\$0.12	\$0.12
	\$0.22	\$0.22
	\$0.17	\$0.17
	\$0.14	\$0.14
	\$0.29	\$0.29
	\$0.26	\$0.26
	\$0.26	\$0.26
	\$0.26	\$0.26

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

	Title Artist Album Label	Performance	Earning Entity
		Value	Share
		\$0.14	\$0.14
		\$0.26	\$0.26
		\$0.29	\$0.29
		\$0.02	\$0.02
		\$0.10	\$0.10
		\$0.05	\$0.05
		\$0.29	\$0.29
		\$0.05	\$0.05
		\$0.02	\$0.02
		\$0.05	\$0.05
		\$0.26	\$0.26
		\$0.12	\$0.12
		\$0.02	\$0.02
1		\$0.14	\$0.14
		Sub Total:	\$4.28

**Satellite Service** 

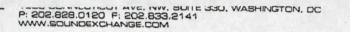
Period: Jul 2004 - Dec 2004

**Entity Name:** 

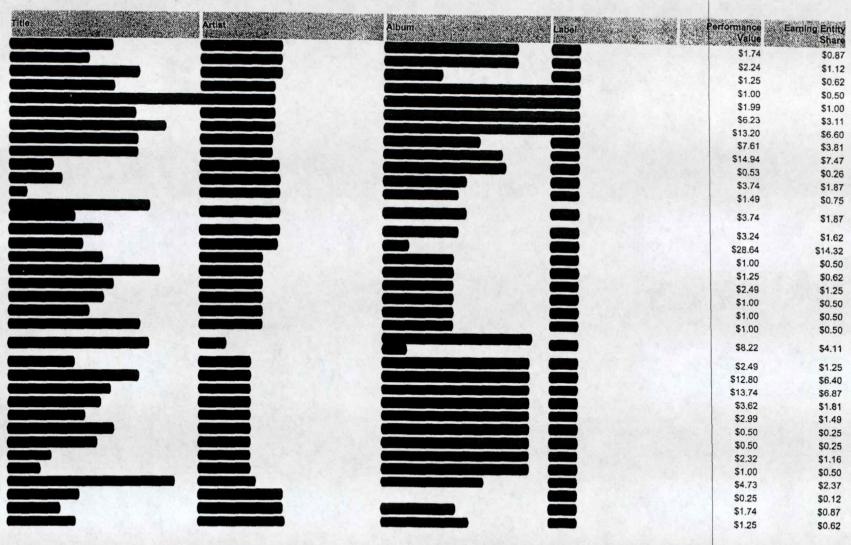
Entity ID:

Title Artist . Album Label	erformance Value	Earning Entity
The second secon	Manager Comments	onare
	\$1.00	\$0.50
	\$1.25	\$0.62
	\$1.49	\$0.75
	\$1.49	\$0.75
	\$1.25	\$0.62
	\$0.75	\$0.37
	\$2.49	\$1.25
	\$0.75	\$0.37
	\$1.99	\$1.00
·	\$1.25	\$0.62

Total Titles for Entity: 785



EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS



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### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title 7 P Label	Performance Value	Earning Entity Share
	\$21.40	\$10.70
()	\$7.72	\$3.86
	\$9.98	\$4.99
	\$1.25	\$0.62
	\$10.76	\$5.38
	\$0.75	\$0.37
	\$5.73	\$2.86
	\$7.61	\$3.81
(	\$1.00	\$0.50
	\$2.49	\$1.25
	\$6.83	\$3.41
	\$0.50	\$0.25
	\$4.73	\$2.37
	\$3.24	\$1.62
	\$10.63	\$5.31
	\$2.24	\$1.12
	\$9.71	\$4.86
	\$2.49	\$1.25
	\$2.99	\$1.49
[	\$1.99	\$1.00
	\$2.74	\$1.37
	\$1.99	\$1.00
	\$3.49	\$1.74
	\$1.99	\$1.00
	\$4.98	\$2.49
	\$4.48	\$2.24
	\$0.75	\$0.37
	\$3.74	\$1.87
	\$3.74	\$1.87
	\$2.24	\$1.12
	\$7.47	\$3.74
	\$0.50	\$0.25

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#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Titia: Album Label P	erformance E Value	Earning Entity
	\$2.74	\$1.37
	\$1.49	\$0.75
[1]	\$1.25	\$0.62
	\$2.99	\$1.49
	\$3.49	\$1.74
	\$1.99	\$1.00
	\$1.99	\$1.00
	\$2.24	\$1.12
	\$5.23	\$2.62
[1]	\$0.75	\$0.37
	\$6.48	\$3.24
	\$4.23	\$2,12
	\$3.24	\$1.62
	\$2.24	\$1.12
	\$4.98	\$2.49
	\$4.48	\$2.24
	\$5.73	\$2.86
	\$5.23	\$2.62
	\$0.25	\$0.12
	\$4.73	\$2.37
H	\$0.53	\$0.26
	\$5.98	\$2.99
	\$6.97	\$3.48
	\$5.51	\$2.76
	\$13.45	\$6.72
	\$25.62	\$12.81
	\$3.24	\$1.62
	\$5.23	\$2.62
	\$1.00	\$0.50
	\$4.40	\$2.20
	\$13.13	\$6.56
	\$18.04	\$9.02

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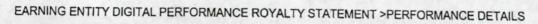
## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Abum Label P	erformance Value	Earning Entity Share
	\$32.55	\$16.28
	\$10.50	\$5.25
	\$7.73	\$3.86
	\$24.70	\$12.35
	\$4.99	\$2.50
	\$27.83	\$13.91
	\$1.00	\$0.50
1	\$43.14	\$21.57
	\$0.50	\$0.25
	\$0.75	\$0.37
	\$7.88	\$3.94
	\$8.47	\$4.23
	\$4.73	\$2.37
이 내가 보고 있다면 하는데 그는데 그는데 그는데 그는데 그는데 그는데 그는데 그는데 그는데 그	\$1.25	\$0.62
	\$7.47	\$3.74
HOLE NO. 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1	\$8.97	\$4.48
	\$0.25	\$0.12
	\$15.23	\$7.61
	\$20.21	\$10.11
	\$26.90	\$13.45
	\$29.39	\$14.69
	\$12.86	\$6.43
	\$0.25	\$0.12
이 프로그램 이 사람이 있는데 그는데 그는데 그래요 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그	\$9.21	\$4.61
- Carrier - Car	\$11.95	\$5.98
	\$0.25	\$0.12
	\$26.65	\$13.32
	\$24.66	\$12.33
	\$0.75	\$0.37
	\$5.98	\$2.99
	\$23.63	\$11.81

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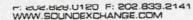
Title Artist Album Label .	Performance Value	Earning Entity Share
The state of the s	\$14.96	\$7.48
	\$2.49	\$1.25
	\$1.00	\$0.50
	\$3.98	
	\$0.25	
	\$1.00	\$0.50
	\$0.75	\$0.37
	\$8.40	\$4.20
	\$6.72	\$3.36
	\$5.98	\$2.99
	\$2.24	\$1.12
	\$3.49	\$1.74
	\$3.24	\$1.62
	\$2.24	\$1.12
	\$4.73	\$2.37
	\$33.41	\$16.71
	\$42.27	\$21.13
	\$3.24	\$1.62
	\$4.23	\$2.12
	\$3.98	\$1.99
	\$23.61	\$11.80
	\$1.00	\$0.50
	\$0.75	\$0.37
	\$9.46	\$4.73
	\$10.21	\$5.11
	\$9.96	\$4.98
	\$4.48	\$2.24
	\$10.96	\$5.48

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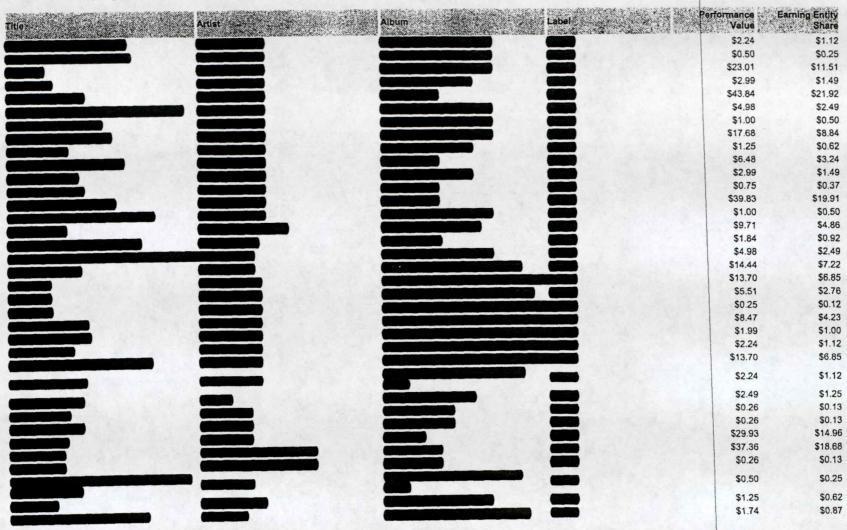


EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

	- Commenter and Charles	A. SANS AND A COMPANY
Title Artist Album Label	Performance	Earning Entity
	Value \$28.39	Share
	\$19.93	\$14.19
	The second secon	\$9.97
	\$1.25	\$0.62
	\$21.43	\$10.71
	\$5.98	\$2.99
	\$27.85	\$13.92
	\$20.18	\$10.09
[1]	\$1.74	\$0.87
	\$1.25	\$0.62
	\$1.49	\$0.75
	\$1.00	\$0.50
	\$3.24	\$1.62
	\$21.01	\$10.51
	\$4.48	\$2.24
	\$26.15	\$13.08
	\$140.46	\$70.23
	\$70.88	\$35.44
	\$0.75	\$0.37
	\$3.24	\$1.62
보는 COMMUNICATION (COMPUTED IN A STATE OF COMPUTED IN A STATE OF COM	\$0.25	\$0.12
	\$0.75	\$0.37
	\$1.74	\$0.87
	\$1.49	\$0.75
	\$0.75	
	\$0.75	\$0.37
	\$1.49	\$0.75
	\$0.75	\$0.37
	\$1.00	\$0.50
	\$2.24	\$1.12
	\$61.17	\$30.58
	\$13.65	\$6.83
	\$2.49	\$1.25
	\$63.00	\$31.50



#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS



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#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity Share
	\$5.25	\$2.63
	\$0.75	\$0.37
	\$0.25	\$0.12
	\$0.25	\$0.12
- 19 (19 10 - 19 10 19 10 19 10 19 10 19 10 19 10 19 10 19 10 10 10 10 10 10 10 10 10 10 10 10 10	\$0.25	\$0.12
	\$14.44	\$7.22
	\$3.49	\$1.74
[1]	\$1.99	\$1.00
	\$1.49	\$0.75
	\$1.49	\$0.75
45	\$19.68	\$9.84
	\$22.91	\$11.46
	\$5.48	\$2.74
	\$2.99	\$1.49
	\$0.75	\$0.37
H	\$0.50	\$0.25
	\$2.49	\$1.25
4. D. S.	\$1.49	\$0.75
	\$1.49	\$0.75
	\$1.49	\$0.75
	\$1.99	\$1.00
	\$1.00	\$0.50
	\$2.24	\$1.12
	\$2.74	\$1.37
	\$4.23	\$2.12
	\$0.50	\$0.25
	\$39.10	\$19.55
	\$0.79	\$0.39
	\$1.99	\$1.00
	\$1.49	\$0.75
	\$1.99	\$1.00
	\$5.23	\$2.62

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### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity Share
	\$8.72	\$4.36
	\$6.23	\$3.11
	\$3.24	\$1.62
	\$3.74	\$1.87
	\$1.49	\$0.75
나는 그는 그는 그는 그들은	\$1.00	\$0.75
	\$1.00	\$0.50
	\$2.10	\$1.05
	\$0.50	\$0.25
(1)	\$0.25	\$0.12
	\$0.75	\$0.37
	\$0.25	\$0.12
	\$8.22	\$4.11
	\$0.75	\$0.37
	\$0.75	\$0.37
	\$0.50	\$0.25
H	\$0.75	\$0.37
	\$46.82	\$23.41
	\$3.49	\$1.74
	\$1.00	\$0.50
	\$0.25	\$0.12
	\$1.74	\$0.87
	\$0.25	\$0.12
	\$0.25	\$0.12
	\$0.25	\$0.12
	\$1.05	\$0.52
	\$1.25	\$0.62
	\$1.00	\$0.50
	\$0.75	\$0.37
	\$0.75	\$0.37
	\$0.50	\$0.25
	\$1.00	\$0.50
	\$19.95	\$9.98

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### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title		Artist	Album	Label	Performance Value	Earning Entity Share
Cally	CONTROL OF		Separation of the second secon	THE PROPERTY OF THE PROPERTY O	\$1.99	\$1.00
					\$24.29	\$12.15
					\$2.24	\$1.12
					\$27.56	\$13.78
					\$2,24	\$1.12
					\$30.98	\$15.49
				Company of the state of the sta	\$1.25	\$0.62
					\$1.49	\$0.75
					\$1.25	\$0.62
					\$1.74	\$0.87
					\$6.72	\$3.36
- 10					\$6.23	\$3.11
					\$4.48	\$2.24
					\$0.79	\$0.39
					\$22.53	\$11.26
					\$3.98	\$1.99
					\$17.06	\$8.53
					\$1.99	\$1.00
					\$17.59	\$8.79
			133,127		\$4.48	\$2.24
					\$1.74	\$0.87
					\$0.50	\$0.25
					\$1.99	\$1.00
					\$3.98 \$16.80	\$1.99 \$8.40
			MERCHANICA AND AND AND AND AND AND AND AND AND AN		\$26.25	\$13.13
					\$26.78	\$13.39
					\$1.49	\$0.75
					\$1.49	\$0.75
					\$1.74	\$0.87
					\$1.99	\$1.00
					\$1.49	\$0.75
					Service Control of the Control of th	

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label Performan	e Earning Entity
\$1.	25 \$0.62
\$7.	22 \$3.61
\$1.	99 \$1.00
\$5.	
\$0.	
\$0. \$0.	
11 (A)	
\$0.	
\$22.	
\$5.	3 \$2.62
\$19.	3 \$9.71
So:	96 \$0.13
\$0.5	0 \$0.25
\$0.5	3 \$0.26
\$0.0	0 \$0.25
\$1.3	4 \$0.87
\$0.2	5 \$0.12
\$1.0	
\$6.4	
\$0.2	
\$0.7	
\$1.5	9 \$1.00
\$0.2 \$1.2 \$17.5 \$0.9	5 \$0.12
\$1.2	
\$17.5	
\$0.5	
\$0.5	
\$10.4	
\$3.4	9 \$1.74
\$1.4	9 \$0.75

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### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity Share
	\$73.22	\$36.61
	\$32.87	\$16.44
	\$1.74	\$0.87
	\$0.75	\$0.37
	\$7.88	\$3.94
	\$1.05	\$0.52
	\$0.25	\$0.12
	\$2.24	\$1.12
	\$0.25	\$0.12
	\$3.24	\$1.62
	\$2.99	\$1.49
	\$0.25	\$0.12
	\$0.25	\$0.12
	\$18.38	\$9.19
	\$112.62	\$56.31
	\$0.50	\$0.25
	\$0.75	\$0.37
	\$0.50	\$0.25
	\$11.29	\$5.64
[1]	\$0.50	\$0.25
	\$21.67	\$10.83
	\$0.25	\$0.12
	\$77.97	\$38.98
	\$68.49	\$34.24
	\$0.25	\$0,12
전	\$2.99	\$1.49
	\$0.50	\$0.25
	\$6.97	\$3.49
	\$111.83	\$55.92
	\$11.46	\$5.73
	\$2.24	\$1.12

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Album Cabel Per	rformance Value	Earning Entity Share
	\$29.39	\$14.69
	\$90.83	\$45.42
	\$50.67	\$25.33
그 그 그 그는 그 그는	\$51.55	\$25.78
	\$1.00	\$0.50
	\$12.20	\$6.10
	\$8.14	\$4.07
	\$6.48	\$3.24
	\$1.00	\$0.50
	\$0.25	\$0.12
	\$3.49	\$1.74
	\$18.38	\$9.19
	\$0.75	\$0.37
	\$18.64	\$9.32
	\$0.26	\$0.13
	\$3.49	\$1.74
46 - [18] (18] (18] (18] (18] (18] (18] (18] (	\$0.50	\$0.25
선 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그 그	\$7.47	\$3.74
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$88.41	\$44.21
	\$0.75	\$0.37
	\$0.26	\$0.13
	\$20.67	\$10.34
	\$0.50	\$0.25
	\$0.25	\$0.12
	\$50.56	\$25.28
	\$0.75	\$0.37
	\$0.25	\$0.12
	\$0.25	\$0.12

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity Share
	\$0.50	\$0.25
	\$0.53	\$0.26
	\$0.26	\$0.13
	\$0.25	\$0.12
	\$4.98	\$2.49
. <del></del>	\$17.85	\$8.93
	\$0.50	\$0.25
	\$18.11	\$9.06
	\$1.74	\$0.87
[1] [1] [1] [1] [1] [1] [1] [1] [1] [1]	\$47.25 \$30.38	\$23.63
	\$0.50	\$15.19
		\$0.25
	\$0.25	\$0.12
	\$1.00	\$0.50
	\$1.49	\$0.75
	\$0.50	\$0.25
	\$4.98	\$2,49
[2]	\$0.75	\$0.37
	\$2.49	\$1.25
	\$0.25	\$0.12
	\$1.25	\$0.62
	\$1.49	\$0.75
	\$6.23	\$3.11
	\$0.75	\$0.37
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	\$53.03	\$26.51
	\$18.38	\$9.19
	\$0.26	\$0.13
	\$3.49	\$1.74
	\$0.26	\$0.13
	\$0.25	\$0.12

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist : Album Label	Performance Value	Earning Entity Share
	\$0.26	\$0.13
	\$60.77	\$30.38
	\$15.23	\$7.61
	\$9.71	\$4.86
	\$0.53	
		\$0.26
	\$4.46	\$2.23
	\$1.00	\$0.50
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.75	\$0.37
	\$1.25	\$0.62
	\$0.50	\$0.25
	\$0.25	\$0.12
)	\$1.25	\$0.62
	\$1.00	\$0.50
	\$1.31	\$0.66
	\$0.26	\$0.13
	\$0.75	\$0.37
	\$0.25	\$0.12
	\$0.25	\$0.12
	\$8.40	\$4.20
	\$16.80	\$8.40
	\$0.25	\$0.12
	\$1.49	\$0.75
	\$70.09	\$35.05
	\$0.25	\$0.12
	\$1.00	\$0.50
	\$1.00	\$0.50
	\$34.91	\$17.46

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### Current Distribution (Continued)



Performance Value	Earning Entity Share
\$24.41	\$12.21
\$1.25	\$0.62
\$3.74	\$1.87
\$1.99	\$1.00
\$0.50	\$0.25
\$7.97	\$3.98
\$8.72	\$4.36
\$1.05	\$0.52
\$3.49	\$1.74
\$16.54	\$8.27
\$268.20	\$134.10
\$14.44	\$7.22
\$0.26	\$0.13
\$16.54	\$8.27
\$0.75	\$0.37
\$7.88	\$3.94
\$1.00	\$0.50
\$17.59	\$8.79
\$17.85	\$8.93
\$0.25	\$0.12
\$1.74	\$0.87
\$0.25	\$0.12
\$1.58	\$0.79
\$15.75	\$7.88
\$133.49	\$66.75
\$3.41	\$1.71
\$18.11	\$9.06
\$23.89	\$11.94
\$0.50	\$0.25
\$0.50	\$0.25

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### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Arlist Album Label Performan Val	ce Earning Entity ue Share
\$0.	25 \$0.12
\$0. \$66.	
\$1. \$0.	25 \$0.62 26 \$0.13
\$0. \$17.	33 \$8.66
\$0.	
\$1.: \$24.	99 \$1.00
\$24.	\$12.34
\$0.	75 \$0.37
\$2. \$0. \$0.	
So.	
\$0.3 \$0.3 \$24.9	25 \$0.12
\$24.5 \$1.0 \$0.0 \$0.0	00 \$0.50 50 \$0.25
\$1.2	\$0.62
\$2.5 \$2.5 \$2.0 \$2.4	99 \$1.49 7 \$10.09
S1.5	9 \$1.00
\$0.5	\$0.25
\$1.4	
\$0.5 \$0.5	
\$3.5	

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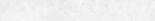


# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

	Title	Artist	Album	Label	Perf
0					
(					
-					

\$5.73 \$0.50 \$0.50 \$28.14 \$14. \$0.53 \$0.26 \$0.26 \$0.26 \$1.25 \$1.25 \$1.00 \$0.25 \$0.50 \$0.26 \$0.50 \$0.26 \$0.50 \$0.50 \$0.50 \$0.50 \$0.50 \$0.50 \$0.26 \$18.11 \$9.9 \$1.69 \$17.59 \$8.7 \$2.74 \$1.3 \$0.50 \$	Performance Value	Earning Entity Share
\$0.50 \$0. \$28.14 \$14. \$0.53 \$0. \$0.26 \$0. \$0.26 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$0.50 \$0.26 \$0. \$1.41 \$9. \$1.59 \$1.6 \$1.759 \$8.7 \$2.74 \$1.3 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$0.53 \$0.2 \$0.53 \$0.2 \$0.53 \$0.2 \$0.50 \$0.2 \$1.00 \$0.5 \$1.00 \$0.5 \$1.00 \$0.5 \$1.7.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$1.7.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$1.7.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$1.7.59 \$8.7 \$0.50 \$0.2 \$1.7.59 \$8.7 \$0.50 \$0.2 \$1.7.59 \$8.7 \$0.50 \$0.25 \$0.1 \$3.49 \$1.7		\$2.86
\$28.14 \$14. \$0.53 \$0.26 \$0. \$0.26 \$0. \$0.26 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$1.00 \$0.3 \$0.25 \$0.50 \$0.26 \$18.11 \$9.6 \$1.99 \$1.6 \$17.59 \$8.7 \$2.74 \$1.3 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.349 \$0.7 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.25 \$0.1 \$3.49 \$1.7 \$3.49 \$1.7	\$0.50	\$0.25
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\$0.26 \$0. \$0.26 \$0. \$0.26 \$0. \$1.25 \$0. \$1.25 \$0. \$1.25 \$0. \$1.00 \$0. \$0.25 \$0. \$0.50 \$0.26 \$0. \$18.11 \$9.0 \$17.59 \$8.7 \$2.74 \$1.3 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.59 \$0.2 \$1.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$0.53 \$0.2 \$0.25 \$0.1 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$1.00 \$0.5 \$1.7.59 \$8.7 \$0.50 \$0.2 \$0.25 \$0.1 \$3.49 \$1.7 \$3.49 \$1.7	\$0.53	\$0.26
\$1.25 \$0.3 \$1.25 \$0.3 \$1.25 \$0.3 \$1.25 \$0.3 \$1.00 \$0.3 \$0.25 \$0.5 \$0.50 \$0.26 \$1.49 \$1.3 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.7 \$0.50 \$0.2 \$1.7 \$0.50 \$0.2 \$1.7 \$1.70 \$1.7 \$3.49 \$1.7	\$0.26	\$0.13
\$1.25 \$0.3 \$1.00 \$0.3 \$0.25 \$0.50 \$0.26 \$0.50 \$1.99 \$1.0 \$1.7.59 \$8.7 \$2.74 \$1.3 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$1.7 \$3.49 \$1.7	\$0.26	\$0.13
\$1.00 \$0.00	\$1.25	\$0.62
\$0.25 \$0.50 \$0.50 \$0.26 \$0.50 \$0.26 \$0.50 \$0.26 \$0.50 \$0.26 \$0.50 \$0.26 \$0.50 \$0.26 \$0.50 \$0.26 \$0.50 \$0.25 \$0.25 \$0.50 \$0.25 \$0.50 \$0.25 \$0.50 \$0.25 \$0.50 \$0.25 \$0.50 \$0.25 \$0.50 \$0.25 \$0.50 \$0.25 \$0.50 \$0.25 \$0.50 \$0.25 \$0.50 \$0.25 \$0.50 \$0.25 \$0.50 \$0.25 \$0.50 \$0.25 \$0.25 \$0.50 \$0.25 \$0.25 \$0.10 \$0.50 \$0.25 \$0.25 \$0.25 \$0.10 \$0.50 \$0.25	\$1.25	\$0.62
\$0.50 \$0.26 \$0.25	\$1.00	\$0.50
\$0.26 \$0.1 \$18.11 \$9.0 \$1.99 \$1.0 \$17.59 \$8.7 \$2.74 \$1.3 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$0.53 \$0.25 \$0.53 \$0.25 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$1.7.59 \$8.7 \$0.50 \$0.2 \$1.7.59 \$8.7 \$0.50 \$0.2 \$1.7.59 \$8.7 \$0.50 \$0.2 \$1.7.59 \$8.7 \$0.50 \$0.2 \$1.7.59 \$8.7 \$2.24 \$1.17	\$0.25	\$0.12
\$18.11 \$9.00 \$1.99 \$1.00 \$17.59 \$8.7 \$2.74 \$1.3 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$0.53 \$0.25 \$0.50 \$0.25 \$1.00 \$0.50 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$0.25 \$0.1 \$3.49 \$1.7 \$3.49 \$1.7	\$0.50	\$0.25
\$1.99 \$1.0 \$17.59 \$8.7 \$2.74 \$1.3 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$0.53 \$0.2 \$0.25 \$0.1 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$0.25 \$0.1 \$3.49 \$1.7 \$3.49 \$1.7	\$0.26	\$0.13
\$17.59 \$8.7 \$2.74 \$1.3 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$0.53 \$0.2 \$0.55 \$0.2 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$0.50 \$0.2 \$1.7.59 \$8.7 \$0.50 \$0.2 \$1.7.59 \$1.7 \$3.49 \$1.7 \$3.49 \$1.7	\$18.11	\$9.06
\$2.74 \$1.3 \$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$0.50 \$0.2 \$0.53 \$0.25 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$0.25 \$0.1 \$3.49 \$1.7 \$3.49 \$1.7 \$2.24 \$1.11	\$1.99	\$1.00
\$0.50 \$0.2 \$1.49 \$0.7 \$0.50 \$0.2 \$0.53 \$0.25 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$0.25 \$0.1 \$3.49 \$1.7 \$2.24 \$1.1	\$17.59	\$8.79
\$1.49 \$0.7 \$0.50 \$0.2 \$0.53 \$0.2 \$0.25 \$0.1 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$0.25 \$0.1 \$3.49 \$1.7 \$3.49 \$1.7	\$2.74	\$1.37
\$0.50 \$0.2 \$0.53 \$0.2 \$0.25 \$0.1 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$0.25 \$0.1 \$3.49 \$1.7 \$2.24 \$1.1	\$0.50	\$0.25
\$0.53 \$0.2 \$0.25 \$0.1 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$0.25 \$0.1 \$3.49 \$1.7 \$2.24 \$1.1	\$1.49	\$0.75
\$0.25 \$0.1 \$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$0.25 \$0.1 \$3.49 \$1.7 \$2.24 \$1.1	\$0.50	\$0.25
\$0.50 \$0.2 \$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$0.25 \$0.1 \$3.49 \$1.7 \$2.24 \$1.1	\$0.53	\$0.26
\$1.00 \$0.5 \$17.59 \$8.7 \$0.50 \$0.2 \$0.25 \$0.1 \$3.49 \$1.7 \$2.24 \$1.1	\$0.25	\$0.12
\$17.59 \$8.7 \$0.50 \$0.2 \$0.25 \$0.1 \$3.49 \$1.7 \$2.24 \$1.1	\$0.50	\$0.25
\$0.50 \$0.2 \$0.25 \$0.1 \$3.49 \$1.7 \$3.49 \$1.7	\$1.00	\$0.50
\$0.25 \$0.1 \$3.49 \$1.7 \$3.49 \$1.7 \$2.24 \$1.1	\$17.59	\$8.79
\$3.49 \$1.7 \$3.49 \$1.7 \$2.24 \$1.1	\$0.50	\$0.25
\$3.49 \$1.7 \$2.24 \$1.1.	\$0.25	\$0.12
\$2.24 \$1.1.	\$3.49	\$1.74
	\$3.49	\$1.74
	\$2.24	\$1.12
\$0.50 \$0.2	\$0.50	\$0.25
	\$5.48	\$2.74

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

#### **Current Distribution (Continued)**



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### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label Performance Value	Share
\$1.49	\$0.75
\$2.74	\$1.37
\$0.50	\$0.25
\$44.83	\$22.41
\$17.33	\$8.66
\$0.50	\$0.25
\$17.33	\$8.66
\$1.74	\$0.87
\$1.25	\$0.62
\$1.25 \$0.25 \$4.48 \$1.00	\$0.12
\$4.48	\$2.24
\$1.00	\$0.50
\$4.48 \$1.00 \$18.38	\$9.19
\$0.50	\$0.25
\$0.50	\$0.25
\$0.26 \$0.25 \$4.98 \$2.49 \$9.21 \$14.44	\$0.13
\$0.25	\$0.12
\$4.98	\$2.49
\$4.98 \$2.49 \$9.21 \$14.44	\$1.25
\$9.21	\$4.61
\$14.44	\$7.22
\$5.51 \$7.47	\$2.76
\$7.47	\$3.74
\$5.98	\$2.99
\$1.99	\$1.00
\$11.71	\$5.85
\$0.50	\$0.25
\$0.75	\$0.37
\$0.25	\$0.12



# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title	Artist	Album	Label

Performance ~Value	Earning Entity Share
\$2.24	\$1.12
\$1.25	\$0.62
\$19.95	\$9.98
\$151.64	\$75.82
\$2.24	\$1.12
\$0.53	\$0.26
\$0.50	\$0.25
\$32.87	\$16.44
\$0.26	\$0.13
\$0.25	\$0.12
\$0.75	\$0.37
\$3.49	\$1.74
\$2.89	\$1.44
\$1.00	\$0.50
\$1.00	\$0.50
\$0.50	\$0.25
\$17.85	\$8.93
\$0.50	\$0.25
\$0.25	\$0.12
\$0.50	\$0.25
\$0.25	\$0.12
\$0.25	\$0.12
\$1.25	\$0.62
\$0.25	\$0.12
\$2.74	\$1.37
\$17.85	\$8.93
\$0.25	\$0.12
\$57.75	\$28.88
\$1.49	\$0.75
\$0.50	\$0.25
\$0.50	\$0.25
\$1.31	\$0.66

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

	Title	Artist	Album	Label
i				

Performance Value	Earning Entity Share
\$6.04	\$3.02
\$46.20	\$23.10
\$1.99	\$1.00
\$30.88	\$15.44
\$5.48	\$2.74
\$23.36	\$11.68
\$0.50	\$0.25
\$0.25	\$0.12
\$0.75	\$0.37
\$18.90	\$9.45
\$31.24	\$15.62
\$5.23	\$2.62
\$1.74	\$0.87
\$2.24	\$1.12
\$1.00	\$0.50
\$48.30	\$24.15
\$0.25	\$0.12
\$0.25	\$0.12
\$0.50	\$0.25
\$17.85	\$8.93
\$2.24	\$1.12
\$2.36	\$1.18
\$9.21	\$4.61
\$0.75	\$0.37
\$20.42	\$10.21
\$3.49	\$1.74
\$1.58	\$0.79
\$0.25	\$0.12
\$18.11	\$9.06
\$23.89	\$11.94
\$0.79	\$0.39

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title	Artist	Album Label
	5	

Performance Value	Earning Entity Share
\$18.38	\$9.19
\$4.23	\$2.12
\$2.49	\$1.25
\$1.74	\$0.87
\$17.59	\$8.79
\$23.36	\$11.68
\$17.59	\$8.79
\$0.25	\$0.12
\$0.25	\$0.12
\$41.22	\$20.61
\$0.50	\$0.25
\$49.62	\$24.81
\$18.64	\$9.32
\$24.66	\$12.33
\$1.00	\$0.50
\$1.49	\$0.75
\$1.49	\$0.75
\$12.45	\$6.23
\$0.25	\$0.12
\$0.26	\$0.13
\$4.20	\$2.10
\$0.75	\$0.37
\$16.54	\$8.27
\$16.28	\$8.14
\$0.25	\$0.12
\$2.36	\$1.18
\$0.53	\$0.26
\$38.85	\$19.43
\$25.73	\$12.86
\$25.15	\$12.58
\$3.49	\$1.74

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS



Performance I Value	Earning Entity Share
\$3.24	\$1.62
\$0.53	\$0.26
\$0.26	\$0.13
\$11.71	\$5.85
\$18.11	\$9.06
\$0.25	\$0.12
\$2.99	\$1.49
\$0.25	\$0.12
\$2.49	\$1.25
\$0.50	\$0.25
\$48.30	\$24.15
\$0.50	\$0.25
\$0.50	\$0.25
\$1.49	\$0.75
\$1.00	\$0.50
\$52.50	\$26.25
\$2.36	\$1.18
\$0.53	\$0.26
\$55.29	\$27.64
\$18.90	\$9.45
\$1.74	\$0.87
\$0.50	\$0.25
\$0.53	\$0.26
\$123.91	\$61.95
\$86.92	\$43.46
\$0.26	\$0.13
\$0.25	\$0.12
\$0.50	\$0.25
\$0.25	\$0.12
\$1.00	\$0.50
\$18.64	\$9.32

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity Share
	\$1.00	\$0.50
	\$102.86	\$51.43
	\$6.72	\$3.36
	\$30.14	\$15.07
	\$0.75	\$0.37
	\$18.11	\$9.06
	\$0.25	\$0.12
	\$0.75	\$0.37
	\$24.94	\$12.47
	\$0.25	\$0.12
	\$0.25	\$0.12
	\$0.25	\$0.12
	\$1.00	\$0.50
	\$2.36	\$1.18
	\$16.54	\$8.27
	\$38.60	\$19.30
	\$0.50	\$0.25
하는 사람이 아니는	\$0.50	\$0.25
	\$1.49	\$0.75
	\$1.25	\$0.62
	\$4.48	\$2.24
	\$0.50	\$0.25
	\$82.96	\$41.48
	\$0.25	\$0.12
	\$1.49	\$0.75
	\$1.49	\$0.75
	\$1.99	\$1.00
	\$3.49	\$1.74
	Sub Total:	\$3,587.86

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

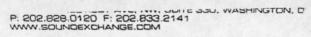
**Current Distribution (Continued)** 

**Entity Name:** 

Entity ID:

Total Titles for Entity: 47

Title Artist Album Label	Performance Value	Earning Entity Share
	\$1.25	\$0.62
	\$2.99	\$1.49
	\$2.74	\$1.37
	\$3.74	\$1.87
	\$1.99	\$1.00
	\$2.99	\$1.49
	\$1.49	\$0.75
	\$1.99	\$1.00
	\$1.25	\$0.62
	\$1.00	\$0.50
[2]	\$13.91	\$6.96
	\$0.50	\$0.25
Harris 1989 (1984) (1984) (1984) (1984) (1984) (1984) (1984) (1984) (1984) (1984) (1984) (1984) (1984) (1984)	\$1.25	\$0.62
	\$1.99	\$1.00
	\$1.99	\$1.00
	\$1.00	\$0.50
[1]	\$0.50	\$0.25
	\$0.50	\$0.25
	\$1.00	\$0.50
	\$0.50	\$0.25
	\$1.25	\$0.62
	\$1.99	\$1.00
	\$2.49	\$1.25
	\$3.49	\$1.74
	\$4.73	\$2.37
	\$6.97	\$3.49
	\$3.74	\$1.87
	\$0.50	\$0.25



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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

# **Current Distribution (Continued)**

**Entity Name:** 

Title	Artist	Album	Label
			=

Entity ID:

	Title	Artist	Album Label
-			

Performance Value	
\$0.25	\$0.12
\$1.99	\$1.00
\$1.99	\$1.00
\$0.25	\$0.12
\$1.00	\$0.50
\$1.74	\$0.87
\$1.25	\$0.62
\$0.75	\$0.37
\$1.74	\$0.87
\$8.97	\$4.48
\$0.50	\$0.25
\$3.74	\$1.87
\$2.49	\$1.25
\$0.25	\$0.12
\$3.98	\$1.99
\$3.24	\$1.62
\$0.75	\$0.37
\$2.24	\$1.12
\$2.99	\$1.49
Sub Total:	\$54.90

# Total Titles for Entity: 50

Performance Value	Earning Entity Share
\$0.75	\$0.37
\$0.75	\$0.37
\$0.75	\$0.37

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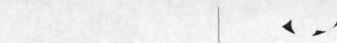
# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title	Artist	Album	Cabel (	Perform
		-		

Performance Earn Value	ing Entity Share
\$0.75	\$0.37
\$2.74	\$1.37
\$2.74	\$1.37
\$2.74	\$1.37
\$0.75	\$0.37
\$0.25	\$0.12
\$0.25	\$0.12
\$0.25	\$0.12
\$0.25	\$0.12
\$0.25	\$0.12
\$0.25	\$0,12
\$0.25	\$0.12
\$0.25	\$0.12
\$0.25	\$0.12
\$0.25	\$0.12
\$0.25	\$0.12
\$0.25	\$0.12

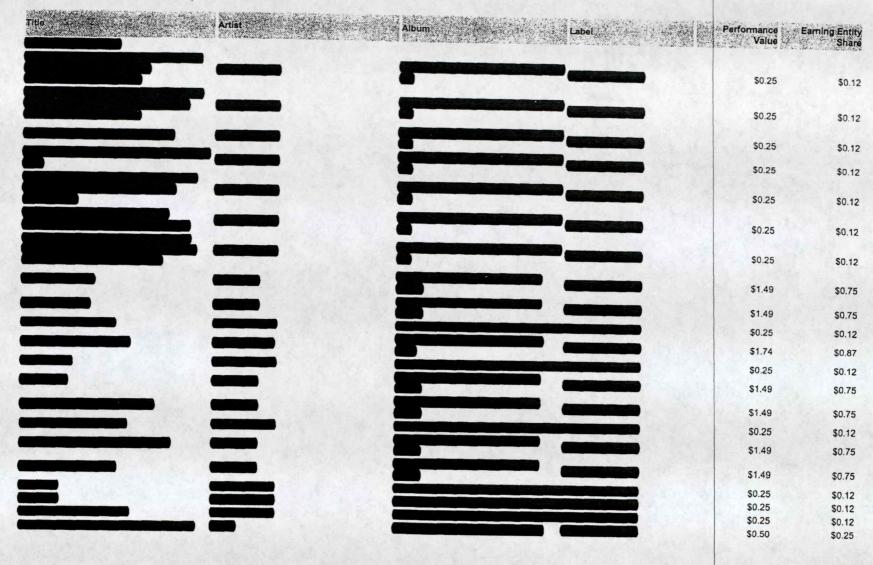
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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

# **Current Distribution (Continued)**



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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

# **Current Distribution (Continued)**

•

Entity Name:

Entity ID:

Title	Artist	Album	Label
	3 =		
			=

Performance Value	Earning Entity Share
\$0.50	\$0.25
\$0.50	\$0.25
\$0.50	\$0.25
\$1.49	\$0.75
\$1.49	\$0.75
\$1.49	\$0.75
\$1.49	\$0.75
\$0.25	\$0.12
\$0.25	\$0.12
Sub Total:	\$18.68

Total Titles for Entity: 167

Performance I Value	Earning Entity Share
\$6.23	\$3.11
\$0.50	\$0.25
\$3.24	\$1.62
\$10.21	\$5.11
\$5.73	\$2.86
\$1.00	\$0.50
\$0.50	\$0.25
\$1.00	\$0.50
\$1.00	\$0.50
\$1.00	\$0.50
\$1.49	\$0.75
\$1.25	\$0.62
\$2.24	\$1.12

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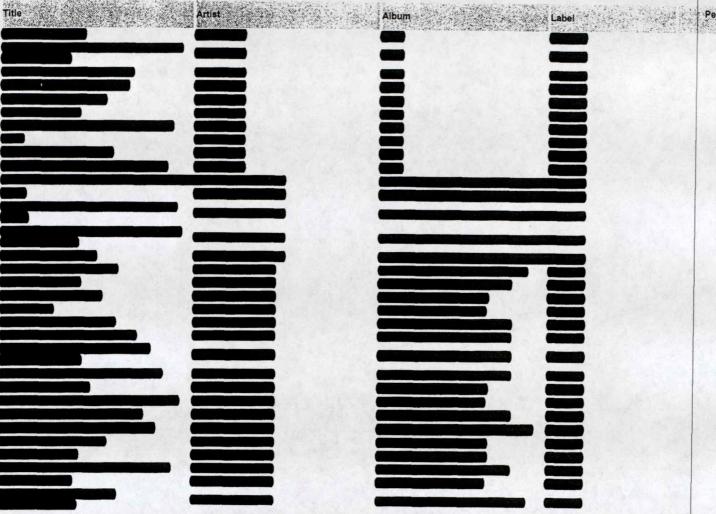
# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity
	\$2.49	\$1.25
	\$1.99	\$1.00
	\$2.49	\$1.25
	\$1.99	
		\$1.00
	\$2.74	\$1.37
	\$2.24	\$1.12
	\$2.24	\$1.12
	\$2.24	\$1.12
	\$2.49	\$1.25
	\$0.25	\$0.12
	\$2.74	\$1.37
	\$3.49	\$1.74
	\$6.27	\$3.14
	\$8.47	\$4.23
	\$2.24	\$1.12
	\$8.28	\$4.14
	\$2.74	\$1.37
	\$5.73	\$2.86
	\$3.74	\$1.87
	\$8.72	\$4.36
	\$6.23	\$3.11
	\$4.73	\$2.37
	\$3.24	\$1.62
	\$5.73	\$2.86
	\$10.96 \$3.98	\$5.48
		\$1.99
	\$0.25 \$5.48	\$0.12
	\$4.23	\$2.74
	\$5.48	\$2.12 \$2.74
	\$24.66	\$12.33
	\$4.73	\$2.37
	\$4.23	\$2.12
	ALCOHOLD STATE	

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS



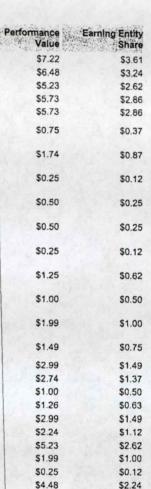
Performance E Value	arning Entity Share
\$10.96	\$5.48
\$5.98	\$2.99
\$4.73	\$2.37
\$5.48	\$2.74
\$5.48	\$2.74
\$8.22	\$4.11
\$11.95	\$5.98
\$10.71	\$5.35
\$2.74	\$1.37
\$10.71	\$5.35
\$12.70	\$6.35
\$7.97	\$3.98
\$0.25	\$0.12
\$17.68	\$8.84
\$6.48	\$3.24
\$1.99	\$1.00
\$6.72	\$3.36
\$0.25	\$0.12
\$0.50	\$0.25
\$7.47	\$3.74
\$12.70	\$6.35
\$6.48	\$3.24
\$0.25	\$0.12
\$0.50	\$0.25
\$4.73	\$2.37
\$6.23	\$3.11
\$0.50	\$0.25
\$6.23	\$3.11
\$0.50	\$0.25
\$6.48	\$3.24
\$2.99	\$1.49
\$3.49	\$1.74



# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**





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\$0.75 \$1.29

\$0.50

\$1.49

\$2.58

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity Share
	\$2.57	\$1.29
	\$7.05	\$3.52
	\$1.49	\$0.75
	\$1.74	\$0.87
	\$1.74	\$0.87
	\$3.08	\$1.54
7 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 -	\$5.73	\$2.87
	\$164.37	\$82.19
	\$1.00	\$0.50
	\$2.74	\$1.37
B	\$2.24	\$1.12
	\$2.49	\$1.25
	\$2.49	\$1.25
	\$9.71	\$4.86
	\$5.48	\$2.74
	\$1.74 \$0.75	\$0.87
		\$0.37
	\$0.25 \$2.24	\$0.12
		\$1.12
	\$10.71 \$1.49	\$5.35
	\$9.71	\$0.75
	\$0.25	\$4.86
	\$0.25	\$0.12
	\$5.48	\$0.25 \$2.74
	\$3.98	\$1.99
	\$1.99	\$1.00
	\$0.75	\$0.37
	\$0.75	\$0.12
(1) : [1] :	\$0.25	\$0.12
	\$2.24	\$1.12
	\$26.15	\$13.08
	\$0.25	\$0.12
	\$9.21	\$4.61
	\$2.49	\$1.25
	\$1.49	\$0.75
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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

# **Current Distribution (Continued)**

Title Artist Album Label	Performance Value	Earning Entity Share
1 CONTROL OF 1 200	\$2.24	\$1.12
	\$2.24	\$1.12
	\$1.99	\$1.00
	\$2.99	\$1.49
[18] [18] [18] [18] [18] [18] [18] [18]	\$1.74	\$0.87
	\$2.74	\$1.37
	\$4.23	\$2.12
	\$1.74	\$0.87
	\$4.23	\$2.12
	\$1.99	\$1.00
	\$1.99	\$1.00
그는 그	\$1.00	\$0.50
	\$2.24	\$1.12
	\$0.25	\$0.12
	\$0.25	\$0.12
	\$0.25	\$0.12
	\$0.25	\$0.12
	\$0.50	\$0.25
	\$0.50	\$0.25
[6]	\$5.48	\$2.74
	\$1.25	\$0.62
	\$2.49	\$1.25
	\$1.99	\$1.00
	\$5.73	\$2.86
	\$1.49	\$0.75
	Sub Total:	\$400.59

**Entity Name:** 

Entity ID:

Total Titles for Entity: 110

Title	Artist	Album	Label	Performance - Ear Value	ming Entity Share
Profes in Medical Colors				\$0.75	\$0.37

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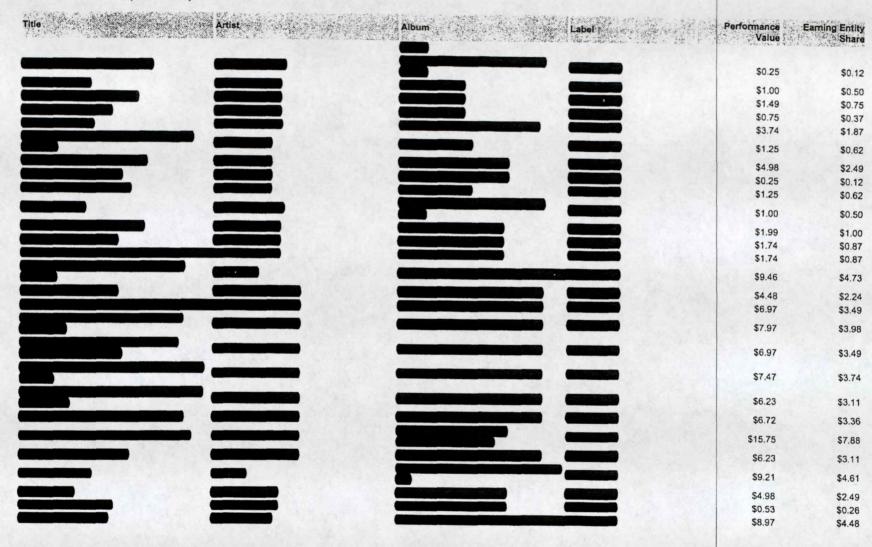
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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

**Current Distribution (Continued)** 



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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title Affist Album Label	Performance Value	Earning Entity Share
	\$1.74	\$0.87
	\$1.74	\$0.87
	\$1.74	\$0.87
	\$1.74	\$0.87
	\$0.75	\$0.37
	\$1.84	\$0.92
	\$0.75	\$0.37
	\$0.75	\$0.37
	\$0.50	\$0.25
	\$1.49	\$0.75
	\$1.49	\$0.75
	\$1.49	\$0.75
	\$1.00	\$0.50
	\$1.49	\$0.75
	\$0.26	\$0.13
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$3.24 \$0.50	\$1.62 \$0.25
	\$0.50	\$0.25
	\$1.25	\$0.62

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Album Label 1999	Performance Value	Earning Entity Share
	\$1.74	\$0.87
	\$14.44	\$7.22
	\$0.26	\$0.13
	\$4.46	\$2.23
	\$0.26	\$0.13
	\$3.24	\$1.62
	\$13.95	\$6.97
	\$1.00	\$0.50
	\$3.24	\$1.62
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$1.49	\$0.75
	\$2.24	\$1.12
	\$1.00	\$0.50
	\$2.99	\$1.49
	\$1.49	\$0.75
	\$0.50	\$0.25
	\$1.00	\$0.50
	\$3.41	\$1.71
	\$2.24	\$1.12
	\$0.75	\$0.37
	\$3.24	\$1.62
	\$1.49	\$0.75
	\$1.49	\$0.75

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Title Artist Album Label	Performance Value	Earning Entity
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$1.00	\$0.50
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
	\$0.50	\$0.25
		40.20

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

# **Current Distribution (Continued)**

Title	Artist	Album	Label
		- =	
			F=
			7=
	. 5		

Entity Name:	Entity ID:

	Title	Artist	Album	Label
1				
-				
1				

Earning Entity Share Performance Value \$3.98 \$1.99 \$0.75 \$1.49 \$0.75 \$1.49 \$0.25 \$0.12 \$2.99 \$1.49 \$3.24 \$1.62 \$11.03 \$5.51 \$0.50 \$0.25 \$1.99 \$1.00 \$2.10 \$1.05 \$1.84 \$0.92 \$9.71 \$4.86 \$2.24 \$1.12 \$2.74 \$1.37 \$3.98 \$1.99 Sub Total: \$138.67

## Total Titles for Entity: 72

Performance E Value	aming Entity
CONTRACTOR DESCRIPTION DE L'ARREST	Share
\$2.49	\$1.25
\$4.23	\$2.12
\$2.49	\$1.25
\$2.24	\$1.12
\$1.99	\$1.00
\$3.98	\$1.99

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS

Title Artist	Album Label Performance Value	Earning Entity Share
	\$1.74	\$0.87
	\$2.49	\$1.25
	\$2.74	\$1.37
	\$0.25	\$0.12
	\$1.74	\$0.87
	\$2.74 \$0.25 \$1.74 \$0.25 \$2.24 \$2.29 \$3.57 \$1.74 \$1.74 \$1.74 \$2.24 \$1.90 \$2.24 \$1.00 \$2.49 \$1.00 \$2.49 \$1.25 \$1.99 \$1.49 \$1.25 \$1.99 \$1.49 \$1.25 \$1.99 \$1.49 \$1.20 \$1.20	\$0.12
	\$2.24	\$1.12
	\$2.24	\$1.12
	\$2.99	\$1.49
	\$2.99 \$3.57 \$1.74 \$1.49 \$1.74 \$2.24	\$1.78
	\$1.74	\$0.87
	\$1.49	\$0.75
	\$1.74	\$0.87
	\$2.24	\$1.12
	\$1.99 \$2.49 \$2.24 \$1.00 \$2.49	\$1.00
	\$2.49	\$1.25
	\$2.24	\$1.12
	\$1.00	\$0.50
	\$2.49	\$1.25
	\$1.74 \$1.25	\$0.87
	\$1.25	\$0.62
	\$1.99	\$1.00
	\$1.49	\$0.75
· · · · · · · · · · · · · · · · · · ·	\$2.24	\$1.12
	\$1.25	\$0.62
	\$1.49 \$2.24 \$1.25 \$1.00 \$1.74 \$1.99	\$0.50
	\$1.74	\$0.87
	\$1.99	\$1.00
	\$2.24	\$1.12
	\$0.25	\$0.12
(1) (1) (1) (1) (1) (1) (1) (1) (1)	\$0.25	\$0.12
	\$2.24	\$1.12
	\$6.72	\$3.36
	\$3.49	\$1.74
		\$0.75
	\$2.24	\$1.12

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Earning Entity

Share

\$0.50

\$0.50

\$0.37

\$0.37

\$0.12

\$0.37

\$0.25

\$0.50

\$0.25

\$0.12

\$0.25

\$0.13

\$0.50

\$0.25

\$0.12

\$0.37

\$0.12

\$0.25

\$1.62

\$0.50

\$0.50

\$1.62

\$0.25 \$0.12

\$0.50

\$0.12

\$0.25

\$0.25

\$1.37

\$0.37

\$57.20

Performance

Value

\$1.00

\$1.00

\$0.75

\$0.75

\$0.25

\$0.75

\$0.50

\$1.00

\$0.50

\$0.25

\$0.50

\$0.26

\$1.00

\$0.50

\$0.25

\$0.75

\$0.25

\$0.50

\$3.24

\$1.00

\$1.00

\$3.24

\$0.50

\$0.25

\$0.25

\$0.50

\$0.50

\$2.74

\$0.75

Sub Total:

# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

Title	Artist	Album	Label
三.			

**Entity Name:** 

Entity ID:

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

**Current Distribution (Continued)** 

Total Titles for Entity: 14

Title Artist Album Label F	erformance Value	Earning Entity Share
	\$6.23	\$3.11
	\$1.74	\$0.87
	\$9.98	\$4.99
	\$5.48	\$2.74
	\$5.25	\$2.63
	\$19.69	\$9.84
	\$1.00	\$0.50
	\$0.26	\$0.13
	\$0.75	\$0.37
	\$7.35	\$3.68
	\$1.00	\$0.50
	\$18.93	\$9.46
	\$14.44	\$7.22
	\$0.53	\$0.26
	Sub Total:	\$46.31

**Entity Name:** 

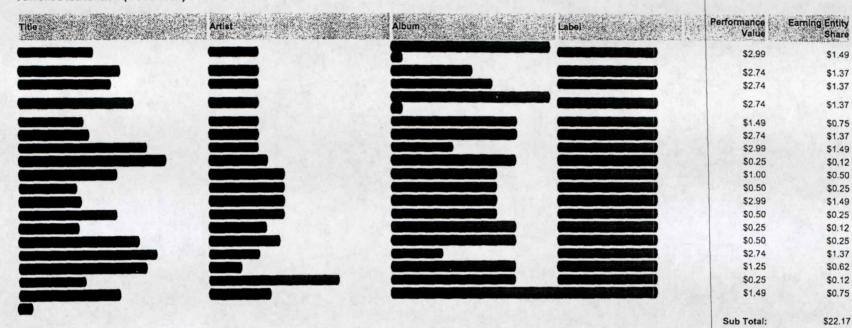
Entity ID:

Total Titles for Entity: 26

Title Artist Album 4 Label	erformance Value	Earning Entity Share
	\$4.23	\$2.12
	\$1.00	\$0.50
	\$1.00	\$0.50
	\$1.25	\$0.62
	\$1.25	\$0.62
	\$2.24	\$1.12
	\$1.74	\$0.87
	\$1.49	\$0.75

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EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT >PERFORMANCE DETAILS



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\$1.10

Sub Total:

-\$0.55

-\$0.98

# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PAYEE DETAILS

## **Adjustment Debits**

Subscription Service

Entity Name:	Entity ID:		
		Num 7	Fitles for Entity: 4
Title	Album Cabel Rights Owner Period	Performance Value	
A MANAGE OF THE ANGEL AND THE ANGEL AND	The state of the s	\$11.14	-\$5.57
		\$11.99	
		\$11.14	
	2000 G. B.	\$12.42	-\$6.21
		Sub Total:	-\$23.34
Satellite Service			
Entity Name:	Entity ID:	Num 7	Titles for Entity: 2
		14dill 1	ities for Littity. 2
Title	Album Label Rights Owner Period	Performance	
		Value \$0.87	-\$0.43
		40.07	Ψ0.40

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# Earning Entity: Earning Entity ID: Statement Delivery Method: Website: AKA: Corrections if any¹:

Payee Information:	Corrections if any:
Payee Name:	
Payee ID:	
Address:	
Country:	
Telephone:	
Fax:	
Email:	
Tax ID:	

#### **MEMORANDUM**

To: Royalty Recipient: Sound Recording Copyright Owner

From: John L. Simson, Executive Director

Date: September 2005

Re: Sound Recording Performance and Ephemeral Royalties - September 2005

Distribution

SoundExchange® is pleased to enclose a statement for your statutory performance royalties consisting of one or more of the following:

a) Preexisting satellite services' (PES) (Muzak, Music Choice and DMX) royalties for July through December 2004 performances.

b) Satellite radio services' (XM and SIRIUS) royalties for July through December

2004 performances, and ephemeral phonorecords.

c) If you are newly registered and receiving your first SoundExchange payment it will include any accrued balances we may have been holding for you from previous distributions.

If you are receiving this by hard copy, your check for this period is enclosed. If you are receiving this via email, your check has been mailed (or wired per your specific instructions) and you should be receiving payment shortly.

All repertoire information contained on the enclosed statement was supplied by one or more of the following statutory licensees: Muzak LLC, DMX Music Inc, MUSIC CHOICE, XM Satellite Radio or SIRIUS Satellite Radio. While most of their data is accurate, we have found occasional errors and/or omissions in their reporting. Should you find any other discrepancies, we are happy to review and correct them upon proper and complete notification via our PLAYS search engine at <a href="www.soundexchange.com">www.soundexchange.com</a> or by E-mailing us at: <a href="mailto:repertoire@soundexchange.com">repertoire@soundexchange.com</a>. Please make sure to include the Earning Entity or Account name.

Please inform your recording artists to register directly with SoundExchange in order to receive payment, as many of them are still unaware of our efforts. If you are receiving statutory royalties, then we obviously have royalties for the artists who performed on the recordings you own. You may direct them to the SoundExchange website or to one of our membership representatives. Artists and labels who don't claim royalties within three years may lose their ability to collect those royalties, according to Copyright Office regulations. The SoundExchange Board has already voted to extend the deadline twice, but time is running out.

# We thank you in advance for your assistance in locating and contacting artists.

In order to create a more efficient system and maximize your royalty earnings, it is imperative that all sound recording copyright owners take the responsibility of including certain identifying information in any sound recording content (either physical or digital) sold publicly or delivered to a service that is making digital audio transmissions of sound recordings under statutory license, whether the content is publicly available (including pre-release content delivered to terrestrial radio stations simulcasting their signals over the Internet). The identifying information provided in the sound recording content should be as follows:

- · Featured Artist Name
- Sound Recording Title
- International Standard Recording Code (ISRC)
- · Album Title
- Marketing Label

Inclusion of such data in any commercially released, pre-release or promotional product will facilitate the proper distribution of royalties and reduce the administrative overhead for distributing statutory royalties. SoundExchange would also like to receive this information in order to more efficiently and accurately distribute royalties that may be due to you. If you are able to provide this information electronically, please contact Barrie Kessler, COO, at <a href="mailto:Bkessler@SoundExchange.com">Bkessler@SoundExchange.com</a>.

SoundExchange is an independent, not-for-profit performance rights organization responsible for collecting and distributing webcasting, preexisting subscription (digital cable and satellite television music services) and satellite radio royalties to copyright owners of sound recordings, and the featured and nonfeatured artists who perform on them. SoundExchange currently represents over 850 independent labels, the four major label groups and over 10,000 featured recording artists, and the list is growing daily. We are committed to providing you with the most accurate distributions possible and maximizing your royalty amounts.

Please visit our website at <a href="www.soundexchange.com">www.soundexchange.com</a> to learn more about our activities. You may also contact us at the following:

SoundExchange, Inc. 1330 Connecticut Ave., N.W., Suite 330 Washington, D.C. 20036 P: 202.828.0120

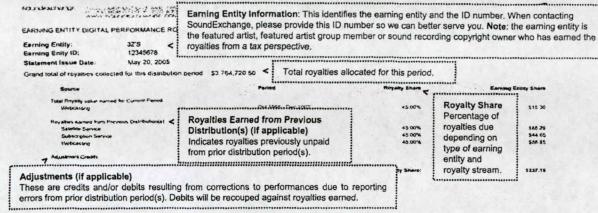
F: 202.833.2141

If you have any questions regarding your statement or payment, please feel free to contact SoundExchange by phone, E-mail, fax or regular mail.



# A Guide to Your Royalty Statement

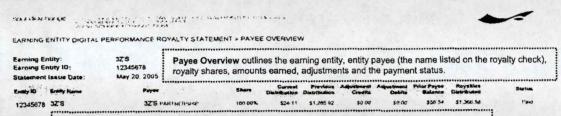
#### **Distribution Summary**



#### **Earning Entity Overview**

Earning Entity: 3ZS
Earning Entity: 12345676
Statement leave Date: May 20, 2005
Entity Earning Entity Statement leave Date: May 30, 2005
Entity Earning Entity Statement leave Date: May 30, 2005
Entity Earning Entity Statement leave Date: May 30, 2005
Entity Earning Entity Statement leave Date: May 30, 2005
Entity Earning Entity Statement leave Date: May 30, 2005
Earning Entity Overview outlines who the earning entities are along with ID numbers, royalty percentages or splits, royalties earned and adjustments.

#### Payee Overview



Note: If tax withholding is indicated, you may be able to minimize or eliminate withholding by providing SoundExchange with a valid Tax ID Number via a W-9 or W-8 (for non-U.S. entities).

#### How Your Royalties are Calculated

>The Royalty Calculation Methodology

#### Actual Performance Information

SoundExchange receives electronic reports of use from licensees. These reports are matched against each payment to determine the proportion each unique sound recording is to receive. Performances are allocated on a pro rata basis, so every performance has equal value.

Important: Please check your performances carefully and inform us of any discrepancies in the correct attribution of featured artist and/or copyright ownership. All royalty payments are conditioned upon your confirmation that the information contained herein is accurate. SoundExchange reserves the right to make adjustments to future statements based upon any errors which are contained herein.

#### SRCO Information

Sound Recording Copyright Owner ("SRCO") information is supplied by the copyright owner and maintained in our royalty systems on a confidential basis.

Electronic reports of use are "matched" against a repertoire and ownership database indicating copyright ownership at the track level. If the recording is not present in this database, our researchers manually identify ownership based on music industry resources including catalogues, directories, Internet, etc.

#### Direct Payment of Featured Artist and Union Shares

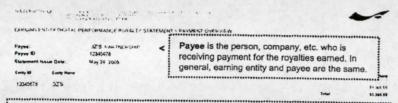
SoundExchange pays the 45% featured artist share of royalties directly to the featured artist. Any payment and account information for a featured artist is provided by the participating copyright owner, artist and/or artist representative. All featured artist information is contained within our royalty system on a confidential basis. Any corrections or discrepancies in payee information should be reported immediately to SoundExchange.

SoundExchange pays the 5% statutory share payable for nonfeatured musicians and vocalists directly to the AFM and AFTRA Intellectual Property Rights Distribution Fund. Please visit <a href="https://www.rardyalties.org">www.rardyalties.org</a> for further information.

# agniadaxajonina

# A Guide to Your Royalty Statement

#### **Payment Overview**



Payment Overview indicates how the total royalties have been allocated according to section 112 or section 114(g) of the U.S. Copyright Act, which defines royalty allocations and payments. The total amount shown should reflect your royalty check amount.

# Label Detail (SRCO Only)

CARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT - LABEL CETAIL LAND MORNING.

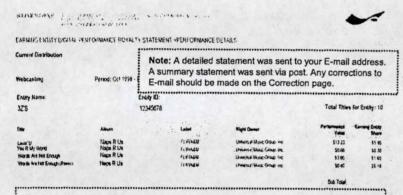
RECUMBERT RECORDS

NAPPY TIME TURES

Label Detail lists all the labels in which the copyright owner has the right to collect sound recording performance royalties.

Discrepancies to the label detail page should be E-mailed to repertoire@soundexchange.com along with your Earning Entity ID Number or faxed to 202.833.2141.

## Performance Details



Performance Detail breaks down each individual performance by the license type, distribution period, then title, album, name of marketing label, name of copyright owner, performance value and share due to earning entity.

Note: any performances valued at \$0 are actually a fraction of a penny, however, the value is reflected in the overall total.

# **Correction Page**

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aming Entity: aming Entity ID		STS PARTNERSHIP 12345678	Corrections If any*:	
lalement Debrer rebate KA	y Waned	Hard Copy		
ayer itormation: Go	prrections if any:			
ayee Name	ZS PARTNERSH	P		
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Please make any necessary changes or supply missing information in the space(s) provided and return the page to the attention of: Membership Department, SoundExchange, 1330 Connecticut Avenue, NW, Suite 330, Washington DC 20036. You may also fax this information to 202.833.2141.

For further information on SoundExchange, visit www.soundexchange.com, contact us directly at 202.828.0120 or via E-mail at info@soundexchange.com.

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ID:

# **ELECTRONIC FUNDS TRANSFER AUTHORIZATION**

# AUTHORIZATION AGREEMENT FOR DIRECT DEPOSITS (ACH CREDITS)

Payee Name:		
I (we) hereby authorize SOUNDEXCHANGE®, hereing Checking Account /   Saving Account (select on named below, hereinafter called DEPOSITORY, and that the origination of ACH transactions to my (our) account to the same of the	ne) indicated below at the to credit the same to su	he depository financial institution uch account. I (we) acknowledge
Depository Name:	Branch:	
City:	State:	Zip:
Routing Number:	Account Number:	
This authorization is to remain in full force and effect (or either of us) of its termination in such time and in s reasonable opportunity to act on it.		
Signature(s):	E-mail:	
Authorized Signature		
Name(s): Please Print	Date:	
Title(s):		
Return this form by mail or fax to: SoundExchange 1330 Connecticut Ave., NW Suite 330 Washington, DC 20036 Phone: 202.828.0120 Fax: 202.833.2141 www.soundexchange.com		

(Rev. 10/3/03)



SX Exhibit 253 DP





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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > DISTRIBUTION SUMMARY

Earning Entity: Earning Enity ID:



#### Statement Issue Date:

Grand total of royalties collected for this distribution period: \$4,765,587.50

Source	Perlod	Royalty Share	Earning Entity Share
Total Royalty value earned for Current Period:			
Satellite Service	Jul 2004 - Dec 2004	45.00%	\$77.42
Subscription Service	Jul 2004 - Dec 2004	45.00%	\$171.19
Royalties earned from Previous Distribution(s):			
Adjustment Credits:			
	T	otal Earning Entity Share:	\$248.61

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > EARNING ENTITY OVERVIEW

Earning Entity: Earning Entity ID:



#### Statement Issue Date:

Entity ID : Entity Name Earning Entity	Share	Current Distribution	Previous Distribution	Adjustment Credit	Royalties Earned
	T parametria	Angeline European August E	acyto, tr proprietario sacra	STANFORMAN SAMPLAN SAM	DRIEBERGANO PERSONA
	100.00%	\$197.08	\$0.00	\$0.00	\$197.08
그 선생님은 이 사람들이 얼마나 되었다면 하시면 그렇게 하는 것이 없는데 모든 사람이 되었다면 되었다.	12.50%	\$12.93	\$0.00	\$0.00	\$12.93
그렇게 가장 그 아니는 아니는 아니는 아니는 아니는 아니는 아니는 아니는 어디 가장 그 것 같다.	75.00%				
	12.50%				
가 <b>소리를</b> 하는 <b>소리를 하고 있다. 이번 가는 시간이 있다. 이번 가는 시간에 가지 않는 시간에 가지 있다. 이번 가지 않는 시간에 가지 않는 시간에 되었다.</b>	16.66%	\$15.94	\$0.00	\$0.00	\$15.94
경우: 100 High State (1987) 이 10 10 10 10 10 10 10 10 10 10 10 10 10	66.68%				
[12] [12] [12] [13] [14] [15] [15] [15] [15] [15] [15] [15] [15	16.66%				
	20.00%	\$10.33	\$0.00	\$0.00	\$10.33
	60.00%				
	20.00%				
	14.28%	\$12.33	\$0.00	\$0.00	\$12.33
	71.44%				
	14.28%				
				Total:	\$248.61

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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PAYEE OVERVIEW

Earning Entity: Earning Entity ID:



## Statement Issue Date:

Entity ID Entity Name	Payee Share	Current Distribution	Previous Distribution			Prior Payee Balance	Royalties Distributed	Status
	100.00%	\$197.08	\$0.00	\$0.00	\$0.00	\$0.00	\$197.08	Paid
and annual and	100.00%	\$12.93	\$0.00	\$0.00	\$0.00	\$0.00	\$12.93	Paid
	100.00%	\$15.94	\$0.00	\$0.00	\$0.00	\$0.00	\$15.94	Paid
	100.00%	\$10.33	\$0.00	\$0.00	\$0.00	\$0.00	\$10.33	Paid
and	100.00%	\$12.33	\$0.00	\$0.00	\$0.00	\$0.00	\$12.33	Paid
					То	tal:	\$248.61	





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## EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PAYMENT OVERVIEW

Payee: Payee ID:

#### Statement Issue Date:

Entity ID Entity Name	ee Share
The state of the s	
용 보다 하다 #################################	\$197.08
	\$12.93
나 그들은 아이들은 아이들은 아이들은 아이들은 아이들은 아이들은 아이들은 아이	\$15.94
	\$10.33
	\$12.33
Total:	\$248.61

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EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

**Current Distribution** 

**Subscription Service** 

Period: Jul 2004 - Dec 2004

**Entity Name:** 

Entity ID:

Total Titles for Entity: 9

Title Label Rights Owner Value	Earning Entity Share
\$6.09	\$0.46
\$1.78	\$0.13
\$29.43	\$2.21
\$1.68	\$0.13
\$26.53	\$1.99
\$2.54	\$0.19
\$4.07	\$0.30
\$6.10	\$0.46
\$4.57	\$0.34

Sub Total: \$6.21

**Entity Name:** 

Entity ID:

Total Titles for Entity: 9

Title Label Rights Owner .	Performance Value	Earning Entity Share
	\$7.62	\$0.49
F		
나는 아니는 아니는 이 사람이 있는데 보다 하는데 그 아니는	\$8.74	\$0.56
:	\$7.12	\$0.46
	\$4.57	\$0.29
	\$0.89	\$0.06
	\$5.66	\$0.36
	\$11.95	\$0.77
	\$5.59	\$0.36
	\$10.80	\$0.69
	Sub Total:	\$4.04

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nge

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# EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

Entity Name:	Entity ID:	
		Total Titles for Entity: 48

Title Label Rights Owner	Performance Value	Earning Entity Share
	\$9.33	\$4.20
	\$1.86	\$0.83
	\$1.07	\$0.48
	\$5.47	\$2.46
	\$10.86	\$4.89
	\$1.48	\$0.66
	\$6.35	\$2.86
	\$13.59	\$6.12
	\$10.51	\$4.73
	\$3.71	\$1.67
	\$3.27	\$1.47
	\$6.35	\$2.86
	\$3.31	\$1,49
	\$10.71	\$4.82
	\$2.74	\$1.23
	\$6.44	\$2.90
	\$4.94	\$2,22
	\$4.77	\$2.14
	\$1.32	\$0.60
	\$10.55	\$4.75
	\$4.06	\$1.83
	\$5.51	\$2.48
	\$3.05	\$1.37
	\$6.63	\$2.98
	\$12.37	\$5.57
	\$47.18	\$21.23
	\$0.31	\$0.14
	\$1.73	\$0.78
	\$17.34	\$7.80
	\$4.93	\$2.22
	\$6.35	\$2.86
	\$6.00	\$2.70





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#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

Title Label Rights Owner	Performance Value	Earning Entity Share
	\$3.81	\$1.72
	\$4.50	\$2.03
	\$6.88	\$3.10
	\$1.50	\$0.67
	\$8.90	\$4.00
	\$3.00	\$1.35
	\$1.59	\$0.71
	\$11.11	\$5.00
	\$5.74	\$2.58
	\$5.59	\$2.52
	\$4.06	\$1.83
	\$6.35	\$2.86
	\$10.67	\$4.80
	\$8.64	\$3.89
	\$8.64	\$3.89
	\$4.59	\$2.07

Sub Total: \$148.35

**Entity Name:** 

JEFFERSON STARSHIP

Entity ID:

60403003

**Total Titles for Entity: 16** 

Title Label Rights Owner Performance Value	Earning Entity Share
\$18,39	\$1.03
\$6.44	\$0.36
\$16.86	\$0.95
\$0.62	\$0.03
\$4.32	\$0.24
\$2.03	\$0.11
\$0.35	\$0.02
\$1.41	\$0.08
\$17.54	\$0.99
\$1.24	\$0.07
\$14.74	\$0.83





#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

Title	Album	pel Performance Value	Earning Entity Share
		\$10.24	\$0.58
		\$4.47	\$0.25
		\$9.89	\$0.56
		\$9.36	\$0.53
		\$19.11	\$1.07
		Sub Total:	\$7.71
Entity Name:	Entity ID:		
		Total Titl	es for Entity: 5
Title	Album	pel Rights:Owner Value	Earning Entity

Title	Album 1	Label	Rights Owner	Performance Value	Earning Entity Share
A TOTAL CONTRACTOR OF THE PROPERTY OF THE PROP	demand to Justice Condition where A read of a principle of a subset responsibilities where a perfect is a resolution of the principle of the principle of the principle of the principle of the perfect o	ALT FOR ELECTION COMMENT THE PROME NOT HOSE STREET STATE TO SELECT STREET STATE TO SELECT STREET STATE TO SELECT STREET STATE STREET ST	2. Long College Colleg	\$8.39	\$0.75
				\$31.98	\$2.88
aven				\$5.56	\$0.50
				\$6.83	\$0.61
				\$1.50	\$0.14
				Sub Total:	\$4.88

Satellite Service Period: Jul 2004 - Dec 2004

Entity Name: Entity ID:

Performance Value **Earning Entity** Rights Owner Share \$9.98 \$0.75 \$19.95 \$1.50 \$67.99 \$5.10 \$13.45 \$1.01 \$8.03 \$0.60 \$2.49 \$0.19

Total Titles for Entity: 8





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EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

Title Album Label Rights Owner Value	在100 年末 10 年 10 年 10 年 10 日 10 日 10 日 10 日 10 日
\$7.72	\$0.58
\$0.25	\$0.02
Sub Total:	\$9.74

**Entity Name:** 

Entity ID:

Total Titles for Entity: 7

Title Album 2 Label Rights Owner Value	Earning Entity Share
\$14.44	C BESTERFORMERS SERVICE AND REPORT COME
\$22.41	
\$2.49	\$0.16
\$0.53	\$0.03
\$88.06	\$5,66
\$0.50	\$0.03
\$0.50	\$0.03
Sub Total	: \$8.28

**Entity Name:** 

Entity ID:

Total Titles for Entity: 15

Title	Album :	Label	Rights Owner	Performance Value	Earning Entity
ACTUAL CONTRACTOR OF THE ACTUAL CONTRACTOR OF THE CONTRACTOR OF TH			APPENDING SECOND SECOND SECOND AS A SECOND S	REMINISTRATION OF THE RESIDENCE OF THE R	MARKET BEFORE THE SAME
	<b>基本的</b>			\$0.79	\$0.35
				\$6.23	\$2.80
				\$1.84	\$0.83
				\$1.00	\$0.45
				\$11.95	\$5.38
		ا سسس		\$16.85	\$7.58
				\$2.99	\$1.34
	Chen Miles and			\$0.53	\$0.24
				\$32.06	\$14.43



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#### EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

#### **Current Distribution (Continued)**

Title Label Rights Owner	Performance Value	
	\$28.30	\$12.73
	\$0.79	\$0.35
	\$0.25	\$0.11
	\$2.89	\$1.30
	\$1.05	\$0.47
	\$0.79	\$0.35
	Sub Total:	\$48.73

Entity Name: Entity ID: Total Titles for Entity: 8

Title Label Rights Owner F	erformance	Earning Entity
	Value	Share
이 아니는 그 아이들은 아이들이 있다면 하는데 이렇게 하는데 하는데 아이들이 아이들이 아니는데 아이들이 아이들이 아이들이 아이들이 아이들이 아이들이 아이들이 아이들	\$21.79	\$1.23
	\$2.49	\$0.14
	\$13.20	\$0.74
	\$0.75	\$0.04
에 목표하는 경기를 가면 하면 하면 하는데 모든데 그렇게 되었다면 모든데 하는데 이번 사람이 모든데 모든데 되었다면 하는데 되었다면 하는데 되었다면 되었다면 하는데 되었다면 하는데 되었다면 하는데 하는데 되었다면 하	\$12.80	\$0.72
, Harrison - Height	\$1.00	\$0.06
	\$30.65	\$1.72
	\$10.21	\$0.57
등에 있다면 있다면 있다면 하다면 하는데 하는데 하는데 하다면 하다면 하다면 하다면 하는데 하다면		
	Sub Total:	\$5.22

Entity Name: Entity ID: Total Titles for Entity: 3

Tille	Album 3 - 15 - 15 - 15 - 15 - 15 - 15 - 15 -	Label	Rights Owner	Performance - Value ***	Earning Entity Share
				\$21.92	\$1.97
				\$28.88 \$9.71	\$2.60 \$0.87



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EARNING ENTITY DIGITAL PERFORMANCE ROYALTY STATEMENT > PERFORMANCE DETAILS

**Current Distribution (Continued)** 

Sub Total:

\$5.45





Tax ID:

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**16** 



#### EE STATEMENT > CORRECTION PAGE

Earning Entity Earning Entity				
Statement Deli Website: AKA:	ivery Method:	Hard Copy		
Payee Information:	Corrections if any:			
Payee Name:				
Payee ID:				
Address:				
Country:				
Telephone:				
Fax:				
Email:				

Corrections if any¹:						
	4-25-51					
F. 10 7.11						

#### **MEMORANDUM**

To: Royalty Recipient: Featured Artist From: John L. Simson, Executive Director

Re: Sound Recording Performance Royalties Distribution

Date: September 2005

SoundExchange<sup>®</sup> is pleased to enclose an attached statement for your statutory performance royalties consisting of one or more of the following:

a. Preexisting satellite services (PES) (Muzak, Music Choice and DMX) royalties for July through December 2004 performances.

b. Satellite radio services (XM and SIRIUS) royalties for July through December 2004 performances.

c. If you are newly registered and receiving your first SoundExchange payment, it will include any accrued balances we may have been holding for you from previous distributions.

If you are receiving this by hard copy, your check for this period is enclosed. If you are receiving this via E-mail, your check has been mailed (or wired per your specific instructions) and you should be receiving payment shortly.

All repertoire information contained on your statement was supplied by statutory licensees.

If you haven't already tried it, we invite you to use SoundExchange's online search engine "PLAYS" at www.soundexchange.com. The PLAYS database includes performances/songs reported to SoundExchange from statutory licensees, including satellite radio and digital cable and satellite television services. After registering and receiving a password, you may go directly to PLAYS, search by title, album, artist or label and see what performed recordings have been reported. Should you see any discrepancies in the search results of PLAYS, we ask that you follow the online instructions to notify us of any changes.

While most of the data supplied to us by licensees is accurate, we have found occasional errors and/or omissions in their reporting. Should you find any discrepancies or have any questions or concerns regarding your statement, we are happy to review and correct them upon proper and complete notification via our PLAYS search engine or by E-mail to: <a href="mailto:repertoire@soundexchange.com">repertoire@soundexchange.com</a>. Make sure to include the Artist ID number and Earning Entity name found on your royalty statement.

SoundExchange is an independent, not-for-profit performance rights organization charged with the collection and distribution of webcasting, digital cable and television music services and satellite radio royalties for copyright owners of sound recordings, and the featured and nonfeatured artists who perform on them. SoundExchange also is actively pursuing all opportunities with foreign performance rights organizations to collect and distribute monies owed or belonging to U.S. artists for their radio (digital and/or terrestrial broadcast) performances in foreign countries.

SoundExchange currently represents over 10,000 featured recording artists, 850 independent labels, and the four major label groups, and this number is growing daily. We are committed to providing you with the most accurate distributions possible and maximizing your royalty amounts. We ask that you please assist us in spreading the word of SoundExchange's mission throughout the music community, as many recording artists and independent record labels are still unaware of this new stream of revenue owed to them.

Please visit our website at <a href="www.soundexchange.com">www.soundexchange.com</a> to learn more about our activities. You may also contact us at the following:

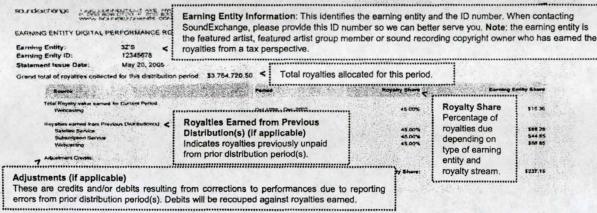
SoundExchange, Inc. 1330 Connecticut Ave., N.W., Suite 330 Washington, D.C. 20036 P: 202.828.0120 F: 202.833.2141

If you have any questions regarding your statement or payment, please feel free to contact SoundExchange by phone, E-mail, fax or regular mail.

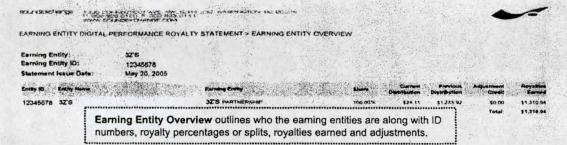


### A Guide to Your Royalty Statement

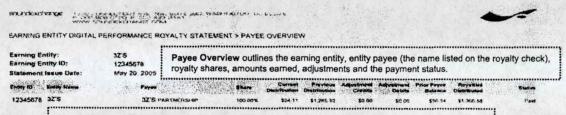
#### **Distribution Summary**



#### **Earning Entity Overview**



#### **Payee Overview**



Note: If tax withholding is indicated, you may be able to minimize or eliminate withholding by providing SoundExchange with a valid Tax ID Number via a W-9 or W-8 (for non-U.S. entities).

#### How Your Royalties are Calculated

>The Royalty Calculation Methodology

#### Actual Performance Information

SoundExchange receives electronic reports of use from licensees. These reports are matched against each payment to determine the proportion each unique sound recording is to receive. Performances are allocated on a pro rata basis, so every performance has equal value.

Important: Please check your performances carefully and inform us of any discrepancies in the correct attribution of featured artist and/or copyright ownership. All royalty payments are conditioned upon your confirmation that the information contained herein is accurate. SoundExchange reserves the right to make adjustments to future statements based upon any errors which are contained herein.

#### SRCO Information

Sound Recording Copyright Owner ("SRCO") information is supplied by the copyright owner and maintained in our royalty systems on a confidential basis.

Electronic reports of use are "matched" against a repertoire and ownership database indicating copyright ownership at the track level. If the recording is not present in this database, our researchers manually identify ownership based on music industry resources including catalogues, directories, Internet, etc.

#### Direct Payment of Featured Artist and Union Shares

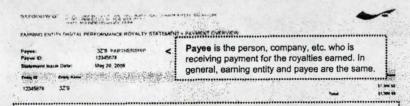
SoundExchange pays the 45% featured artist share of royalties directly to the featured artist. Any payment and account information for a featured artist is provided by the participating copyright owner, artist and/or artist representative. All featured artist information is contained within our royalty system on a confidential basis. Any corrections or discrepancies in payee information should be reported immediately to SoundExchange.

SoundExchange pays the 5% statutory share payable for nonfeatured musicians and vocalists directly to the AFM and AFTRA Intellectual Property Rights Distribution Fund. Please visit <a href="www.raroyalties.org">www.raroyalties.org</a> for further information.

### soundexchange

### A Guide to Your Royalty Statement

#### **Payment Overview**



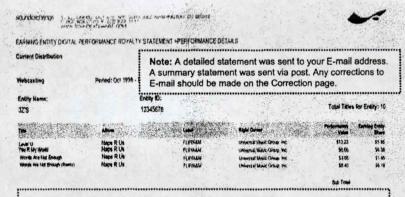
Payment Overview indicates how the total royalties have been allocated according to section 112 or section 114(g) of the U.S. Copyright Act, which defines royalty allocations and payments. The total amount shown should reflect your royalty check amount.

#### Label Detail (SRCO Only)



Label Detail lists all the labels in which the copyright owner has the right to collect sound recording performance royalties. Discrepancies to the label detail page should be E-mailed to repertoire@soundexchange.com along with your Earning Entity ID Number or faxed to 202.833.2141.

#### **Performance Details**



Performance Detail breaks down each individual performance by the license type, distribution period, then title, album, name of marketing label, name of copyright owner, performance value and share due to earning entity.

Note: any performances valued at \$0 are actually a fraction of a penny, however, the value is reflected in the overall total.

#### Correction Page

arning Entity arning Entity		123 PARTNERSHIP	Corrections if any	
Statement Deli Nobsta KKA	very Michael	Mand Copy		
Payee Information:	Cerrections if any:			
Payee Name	328 PARTHERS	HBP		
Payee 10	12345678			
Addres	Se de la			
COLUMN TWO	10000			140
Country				
Telephone:				
mad	\$200 BE 1-10 ME			- delective
(a) (0)				188304

Washington DC 20036. You may also fax this information to 202.833.2141.

For further information on SoundExchange, visit www.soundexchange.com, contact us directly at 202.828.0120 or via E-mail at info@soundexchange.com.



	For Office Use Only
ID:	

#### **ELECTRONIC FUNDS TRANSFER AUTHORIZATION**

#### AUTHORIZATION AGREEMENT FOR DIRECT DEPOSITS (ACH CREDITS)

Payee Name:		
I (we) hereby authorize SOUNDEXCHANGE®, hereina ☐ Checking Account / ☐ Saving Account (select on named below, hereinafter called DEPOSITORY, and that the origination of ACH transactions to my (our) account to the control of the co	<ul> <li>e) indicated below at the depository financial institute to credit the same to such account. I (we) acknowle</li> </ul>	ition
Depository Name:	Branch:	
City:	State: Zip:	
Routing Number:	Account Number:	<b></b>
This authorization is to remain in full force and effect (or either of us) of its termination in such time and in s reasonable opportunity to act on it.		
Signature(s):  Authorized Signature	E-mail:	
Authorized Signature		
Name(s):	Date:	
Please Print		
Title(s):		
Return this form by mail or fax to: SoundExchange 1330 Connecticut Ave., NW Suite 330 Washington, DC 20036 Phone: 202.828.0120 Fax: 202.833.2141 www.soundexchange.com		

(Rev. 10/3/03)

STATEMENT OF ACCOUNT

by Satellite Carriers for Private

for Secondary Transmissions

Home Viewing and Viewing

THIS FORM IS EFFECTIVE FOR THE ACCOUNTING PERIOD BEGINNING JANUARY 1, 2005. if you are filing for a prior accounting period, contact the Licensing Division for the correct form.



### OFFICIAL BUSINESS **United States Copyright Office**

FILING DEADLINE: The Statement of Account must be filed within 30 days after the last day of the accounting penod. The filing deadline is July 30 for the January-June accounting period and January 30 for the July-December accounting period

DATE RECEIVED A

FOR COPYRIGHT OFFICE USE ONLY

\$

THUUMA

FORM SC

P.O. Box 70400

Copyright Office CC/I&R

Satellite Statement of ACCL

Return to,

General Instructions are at the end of this form [pages 1-10].	P.O. Box 70400 Southwest Station Washington, DC 20024-0400  (for couner dehverss, see page 1 of the instructions.)
Space A	
ACCOUNTING PERIOD COVERED BY THIS STATEMENT: (Check one box and fill in the year)  [A] January 1—June 30, 2005 [] July 1—December 31.	
Space B  LEGAL NAME OF SATULLITE CARRIES: Your file is established under this name. Give the full name of the own causes if the owner is a subsidiary of another corporation, give the full corporate title of the subsidiary, not that corporation.	
PRIMETIME DY JOINT VENTURE	
BUSINESS HAMS OF OWNER, IF DIFFERENT	
MAILING ADDRESS  280 PARK AVENUE  23 RD FLOOR, EAST BUILDING  NEW YORK, WY 10017	-

#### Space C

PRIMARY TRANSMITTERS: TELEVISION—In this area, please identify every television station licensed by the Federal Communications Commission (FCC) carried by the satellite carrier during this accounting period. Do not list origination program services such as HBQ. ESPN TBS or CNN

- Column to List each analog station's call sign and each digital station's call sign. For digital stations, include each stream identification (e.g., WABC1, WABC2, etc.).
- . Column 2: Give the number of the channel on which the station's proadcasts are carried in its own community
- Column 3: Indicate whether the station is a "superstation" or a "network" station by entering the letter "S" (for superstation) or "N" (for network). See page to of the General Instructions for the meaning of these terms.
- . Column 4: Give the location of each station. This should be the community (city and state) to which the station is licensed by the FCC

r, Call Sign	2 Channel Number	3 Station Type (S or N)	4. Location of Station
WABCTU	. 7	2	NEW YORK, NY
WSEETU	35	2	ERIE, PA
WKBCTU	<u> </u>	N	KEW YORK, NY
		,	
			, .
			. )
-			
***************************************			
	w		
	anticolor de la company de la		

#### Space D — Copyright Royalty Fee

GENERAL: In this area, teport the number of subscribers receiving each analog and digital superstation and network station retransmitted outside the station's "local market," NOTE: Do not report those subscribers who reside in a community where the station's "significantly viewed." For the definition of a station's "local market," and note regarding "significantly viewed," See page (iii) of the General Instructions.

The subscriber information must be reported for each month of the accounting period. The stations should be grouped together according to whether they are "superstations" or "network" stations as identified in Space C. Then compute the royalty fee in Part 3.

NOTE: In the case of multicasting of digital superstations and network stations, each digital stream that is retransmitted by a satelline carrier must be paid for at the prescribed rate but no royalty payment is due for any program-related material contained on the stream within the meaning of WCN v. United Video, Inc., 693 F.2d 622, 626 (7th Cit. 1982) and Second Report and Order and First Order on Reconsideration in CS Doc No. 98-120, FCC 05-27 at 7.44 & n.158 (Feb. 23, 2005)

#### SPACE P. PART 1 . Carriage for Private Home Viewing

First under the headings suprestations and network stations, enter those stations call signs and the number of subscribers
receiving those stations on the last day of each month of the accounting period. Then, for each station, total the number of subscribers
for all six months of the accounting period and enter that figure under the column labeled soras.

NOTE: Do not include i) those subscribers receiving a superstation retransmitted within the station's "local market," a) not those subscribers receiving a network station retransmitted within that station's "local market" to subscribers reciding in "unserved households", a) not those subscribers who reside in a community where that signal is deemed "significantly viewed" by the FCC, provided that those subscribers receive local-into-local service. See pages (in-ni) of the Ceneral instructions for a definition of those terms

. NEXT: Compute the grand total number of subscribers receiving "superstations" and "network" stations

		SUBSCRIBERS	FOR EACH MONT	OF THE ACCOU	nting period		
Call signs	Month 7 (Jen/štily)	Month 3 (F=bvAug)	(W41\Zeht) Wolith 3	Month 4- (Aprilocy	(NGANON)	Accepte 6' (Justin / Disc.)	Total
	1	L	L				

		SUBSCRIPERS /	OR FACH MONTH	OF THE ACCOUNT	TIME PERIOD		
Сभी शकुराज	(New Trial) Wough 1	(Seprand) (Nouth 3	(war/sebt) Wouth 3	Month 4 (Apr/Oct)	Month 5 (May Nov)	Month 6 (June/Doc)	Total
NABCITY	21156	19748	18 398	דבפדו	16750	15921	109,500
NSEE-TV	22405	20906	19 610	18661	NT 756	16876	116 211
47-284W	31 638	30/63	18859	17994	17172	16345	113,16
	<u></u>						
	l		Crana total	Network Stations.	зырьспрыз (Рпуж	* Home viowing),	78, rEE

#### SPACE D, PART 2 . Carriage for Viewing in a Commercial Establishment

NOTE: A Commercial Establishment is defined as an "establishment used for commercial purposes, such as a bar, restaurant, private office, fitness club, oiling, retail store, bank or other financial institution, supermarket, automobile or boat dealership, or any other establishment with a common business area- and does not include a multi-unit permanent or temporary dwelling where private home viewing occurs, such as a hotel, dormitory, hospital, apartment, condominium, or prison."

 FIRST: Under the heading Superstations, error those stations call signs and the number of subscribers receiving those stations on the last day of each month of the accounting period. Then, for each station, total the number of subscribers for all six months of the accounting period and enter that figure under the column labeled total.

NOTE: Do not include those subscribers receiving a superstation retransmitted within that station's "local market" not those subscribers who reside in a community where that signal is deemed "signal viewed" by the FCC, provided that those subscribers receive local-into-local service. See pages ii—iii of the General instructions for a definition of these terms.

MEXIT: Compute the grand total number of subscribers receiving superstations.

	l	SUBSCRIBERS	FOR EACH MONT	n of the accoun	TING PERIOD		
Call rights	Monto s (Janstudy)	(Feb/Aug) Month a	Months (Mar/Sept)	Month 4. (Apprinct)	Month 5 (May/Nov)	Month 6 (tune/Dec)	िट्य
			·				
				4	į	· ·	

E734 84	•	FAC. 1	

PACE D. PART 3 · Computation of the Royalty Foe	
Enter the grand 1012) "Superstations" for Private Home Viewing subscribers here and multiply by 50 20	× 20 # \$
. Enter the grand total "Network" stations for Private Home Viewing subscribers here and multiply by 50 17	337874 *.17=5 57,438 58
Enter the grand total "Superstations" for Commercial Establishments subscribers here and multiply by 50 40	
, Interest Charge Enter the amount from line 4, Space E, page 5	<b>5</b>
, Add Lines 1-4. This is the satellite carrier's total royalty fee	57,438.58
tennt this amount in the form of an electionic payment, or certified check Copyrights. Do not send cash, We recommend electronic payment	. cashier's check, or money order payable so Register of
Space E — Worksheet for Computing Interest You must complete this worksheet for those loyalty fee payments submitted	• •
explanation of interest assessment, see page (iv) of the General instruction	ns.
. Enter the amount of late payment or underpayment	ş
	× market representation of the Contract of the
Multiply line t by the interest rate?	
and enter the sum here	,,
	,
and enter the sum here  3. Multiply line 3 by the number of days late	***************************************
3. Multiply line 3 by the number of days late  4. Multiply line 3 by co274**	×
3. Multiply line 3 by the number of days late 4. Multiply line 3 by 00274** Enter the amount here (unless 55 00 or less) and on line 4.	×,00274
3. Multiply line 3 by the number of days late  4. Multiply line 3 by co274**	×,00274
3. Multiply line 3 by the number of days late 4. Multiply line 3 by 00274** Enter the amount here (unless 55 00 or less) and on line 4.	*.00274  5
3. Multiply line 3 by the number of days late  4. Multiply line 3 by 00274**  Enter the amount here (unless 55 00 or less) and on line 4,  part 3, space D, (page 5)  *Contact the ucensing Division at (202) 707-8150 for the interest rate for the	*.00274  5 [Imterest charge]  se accounting period in which the late payment or
3. Multiply line 3 by the number of days late  4. Multiply line 3 by 00274**  Enter the amount here (unless 55 00 or less) and on line 4,  part 3, space D, (page 5)  *Contact the uncensing Division at (202) 707-8150 for the interest rate for thunderpayment occurred.	×.00274  5  [imterest charge]  be accounting period in which the lase payment or  for one day late.
3. Multiply line 3 by the number of days late  4. Multiply line 3 by 00274**  Enter the amount here (unless 55 00 or less) and on line 4,  part 3, space D, (page 5)  *Contact the uncensing Division at (202) 707-8150 for the interest rate for the underpayment occurred.  *This is the decimal equivalent of 1/365, which is the interest assessment works if you are filling this worksheet covering a Statement of Account also.	×.00274  5  [imterest charge]  be accounting period in which the lase payment or  for one day late.
3. Multiply line 3 by the number of days late  4. Multiply line 3 by 00274**  Enter the amount here (unless 55 00 or less) and on line 4,  part 3, space D, (page 5)  *Contact the uncensing Division at (202) 707-8150 for the interest rate for the underpayment occurred.  *This is the decimal equivalent of 1/365, which is the interest assessment works if you are filling this worksheet covering a Statement of Account also.	×.00274  5  [imterest charge]  be accounting period in which the lase payment or  for one day late.
3. Multiply line 3 by the number of days late  4. Multiply line 3 by 00274**  Enter the amount here (unless 55 00 or less) and on line 4,  part 3, space D, (page 5)  *Contact the uncensing Division at (202) 707-8150 for the interest rate for the underpayment occurred.  *This is the decimal equivalent of 1/365, which is the interest assessment works if you are filling this worksheet covering a Statement of Account also.	×.00274  5  [Interest charge]  be accounting period in which the lase payment or  for one day lase.
3. Multiply line 3 by the number of days late  4. Multiply line 3 by 00274**  Enter the amount here (unless 55 00 or less) and on line 4,  part 3, space D, (page 5)  *Contact the uncensing Division at (202) 707-8150 for the interest rate for the underpayment occurred.  *This is the decimal equivalent of 1/365, which is the interest assessment works if you are filling this worksheet covering a Statement of Account also.	×.00274  5  [imterest charge]  be accounting period in which the lase payment or  for one day late.

.

Cive the legal name as it appears in Space B.

Space F — Contact Information						
identify an individual	to whom we can write or call about this Statement of Account.					
t MAR	GILLIAN L. MURRAY					
MATLING ADDRESS	PRIMETIME 24					
	280 PARK AVENUE, 23RD FLOOR EAST BUILDING					
	NEW YORK NY IDON					
TELEPHONE NUMBER	INCLUDE AREA CODE) 212-702-4581					
EMAIL (OPTIONAL)	GMUREAY @ modernholdings.com					
-						

#### Space G — Signature

The Statement of Account must be signed in accordance with Copyright Office regulations

t the undersigned Owner or agent of the Satellite Carries or Officer or Partner, if the Satellite Carries is a corporation or partnership, have examined this Statement of Account and hereby declare under penalty of law that all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith. [18 U.S.C., Section 1001 (1985)]

SIGNATURE	tleur (a pm/-
TYPED/PRINTED NAME	HENRY LEE GUY JR
TITE+/CAPACITY	PRESIDENT AND CEO OF THE GENERAL PARTNER
DATE	JULY 29th 2005

THIS FORM IS EFFECTIVE FOR THE ACCOUNTING PERIOD BEGINNING JANUARY 1, 2005. If you are filing for a prior accounting period, contact the Licensing Division for the correct form.



# official Business United States Copyright Office

FILING DEADLINE: The Statement of Account must be filed within 30 days after the last day of the accounting period.

The filing deadline is July 30 for the January-June accounting period and January 30 for the July-December accounting period.

#### STATEMENT OF ACCOUNT

for Secondary Transmissions by Satellite Carriers for Private Home Viewing and Viewing in a Commercial Establishment

General instructions are at the end of this form [pages i-iv].

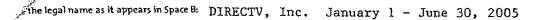
FOR COPYRIGHT	OFFICE USE ONLY
DATE RECEIVED	AMOUNT
DOENSING DIVISION	\$
JUL 2 9 2005	REMITTANCE NUMBER
RECEIVER	

#### FORM SC

Return to:

Copyright Office GC/I&R
Satellite Statement of
Account
P.O. Box 70400
Southwest Station
Washington, DC 20024-0400
(For courier deliveries, see
page 1 of the General
Instructions.)

Space B  LEGAL NAME OF SATELLITE CARRIER: Your file is established under this name. Give the full name of the owner of the satellite carrier. If the owner is a subsidiary of another corporation, give the full corporate title of the subsidiary, not that of the parent corporation.  LEGAL NAME OF OWNER OF SATELLITE CARRIER  DIRECTV, Inc.  BUSINESS NAME OF OWNER, IF DIFFERENT  N/A  MAILING ADDRESS  2230 East Imperial Highway  El Segundo, CA 90245	ace A  OUNTING PERIOD COVERED BY THIS STATEMENT: (Check one box and fill in the year)  January 1–June 30, 2005 July 1– December 31,
carrier. If the owner is a subsidiary of another corporation, give the full corporate title of the subsidiary, not that of the parent corporation.  LEGAL NAME OF OWNER OF SATELLITE CARRIER  DIRECTV, Inc.  BUSINESS NAME OF OWNER, IF DIFFERENT  N/A  MAILING ADDRESS  2230 East Imperial Highway	ace B
DIRECTV, Inc.  BUSINESS NAME OF OWNER, IF DIFFERENT  N/A  MAILING ADDRESS  2230 East Imperial Highway	ier. If the owner is a subsidiary of another corporation, give the full corporate title of the subsidiary, not that of the parent
BUSINESS NAME OF OWNER, IF DIFFERENT  N/A  MAILING ADDRESS  2230 East Imperial Highway	AL NAME OF OWNER OF SATELLITE CARRIER
N/A  MAILING ADDRESS  2230 East Imperial Highway	IRECTV, Inc.
MAILING ADDRESS  2230 East Imperial Highway	INESS NAME OF OWNER, IF DIFFERENT
2230 East Imperial Highway	/A
El Commado CA 00245	230 East Imperial Highway
	1 Sammala CA 00265



#### Space C

PRIMARY TRANSMITTERS: TELEVISION—In this area, please identify every television station licensed by the Federal Communications Commission (FCC) carried by the SATELLITE CARRIER during this accounting period. Do not list origination program services such as HBO, ESPN, TBS, or CNN.

- Column 1: List each analog station's call sign and each digital station's call sign. For digital stations, include each stream identification (e.g., WABC1, WABC2, etc.).
- Column 2: Give the number of the channel on which the station's broadcasts are carried in its own community.
- Column 3: Indicate whether the station is a "superstation" or a "network" station by entering the letter "S" (for superstation) or "N" (for network). See page ii of the General Instructions for the meaning of these terms.
- Column 4: Give the location of each station. This should be the community (city and state) to which the station is licensed by the FCC.

ı. Call	Sign	2. Channel Number	3. Station Type (5 or N)	4. Location of Station
*See	Schedu	le A for a c	omplete list of	stations
		-		
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· · · · · · · · · · · · · · · · · · ·		Andrew Control of the State of		**************************************
				A TOMOR TO A 1000 TO THE CONTROL OF

#### Space D — Copyright Royalty Fee

GENERAL: In this area, report the number of subscribers receiving each analog and digital superstation and network station retransmitted outside the station's "local market." NOTE: Do not report those subscribers who reside in a community where the station is "significantly viewed." For the definition of a station's "local market," and note regarding "significantly viewed," see page (iii) of the General Instructions.

The subscriber information must be reported for each month of the accounting period. The stations should be grouped together according to whether they are "superstations" or "network" stations as identified in Space C. Then compute the royalty fee in Part 3.

NOTE: In the case of multicasting of digital superstations and network stations, each digital stream that is retransmitted by a satellite carrier must be paid for at the prescribed rate but no royalty payment is due for any program-related material contained on the stream within the meaning of WGN v. United Video, Inc., 693 F.2d 622, 626 (7th Cir. 1982) and Second Report and Order and First Order on Reconsideration in CS Doc. No. 98-120, FCC 05-27 at ¶ 44 & n.158 (Feb. 23, 2005).

#### SPACE D, PART 1 · Carriage for Private Home Viewing

• FIRST: Under the headings superstations and NETWORK STATIONS, enter those stations' call signs and the number of subscribers receiving those stations on the last day of each month of the accounting period. Then, for each station, total the number of subscribers for all six months of the accounting period and enter that figure under the column labeled TOTAL.

NOTE: Do not include 1) those subscribers receiving a superstation retransmitted within the station's "local market," 2) nor those subscribers receiving a network station retransmitted within that station's "local market" to subscribers residing in "unserved households", 3) nor those subscribers who reside in a community where that signal is deerned "significantly viewed" by the FCC, provided that those subscribers receive local-into-local service. See pages (II-III) of the General Instructions for a definition of these terms.

• NEXT: Compute the grand total number of subscribers receiving "superstations" and "network" stations.

		SUBSCRIBERS	FOR EACH MON	TH OF THE ACCOL	INTING PERIOD		
Call signs	Month 1 (Jan/July)	Month 2 (Feb/Aug)	Month 3 (Mar/Sept)	Month 4 (Apr/Oct)	Month 5 (May/Nov)	Month 6 (hune/Dec)	Total
//GN	11,888,756	12,064,288	12,167,830	12,214,996	12,218,945	12,222,061	72,776,876
KWGN	36,421	36,872	37,501	38,066	38,509	38,923	226,292
	<del> </del>						
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						<del> </del>	

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athe legal name as it appears in Space B: DIRECTV, Inc. January 1 - June 30, 2005

	_	NETWORK STA	TIONS ANAL	OG & DIGITAL	(PRIVATE HOME VIE	wing)		
		SUBSCRIBERS FOR EACH MONTH OF THE ACCOUNTING PERIOD						
Call signs	Month 1 (Jan/July)	Month 2 (Feb/Aug)	Month 3 (Mar/Sept)	Month 4 (Apr/Oct)	Month 5 (May/Nov)	Month 6 (June/Dec)	Total	
*See Schedu	e B for a co	mplete list o	f network sta	tions				
				·			····	
				***************************************				
							<del></del>	
			Grand total	Network Stations'	subscribers (Privat	e Home Viewing):		

#### SPACE D, PART 2 · Carriage for Viewing in a Commercial Establishment

NOTE: A Commercial Establishment is defined as an "establishment used for commercial purposes, such as a bar, restaurant, private office, fitness club, oil rig, retail store, bank or other financial institution, supermarket, automobile or boat dealership, or any other establishment with a common business area: and does not include a multi-unit permanent or temporary dwelling where private home viewing occurs, such as a hotel, dormitory, hospital, apartment, condominium, or prison."

• FIRST: Under the heading SUPERSTATIONS, enter those stations' call signs and the number of subscribers receiving those stations on the last day of each month of the accounting period. Then, for each station, total the number of subscribers for all six months of the accounting period and enter that figure under the column labeled TOTAL.

**NOTE:** Do not include those subscribers receiving a superstation retransmitted within that station's "local market" nor those subscribers who reside in a community where that signal is deemed "significantly viewed" by the FCC, provided that those subscribers receive local-into-local service. See pages ii—iii of the General Instructions for a definition of these terms.

• NEXT: Compute the grand total number of subscribers receiving "superstations."

		SUBSCRIBER	S FOR EACH MON	TH OF THE ACCO	JNTING PERIOD		
Call signs	Month 1 (Jan/July)	Month 2 (Feb/Aug)	Month 3 (Mar/Sept)	Month 4 (Apr/Oct)	Month 5 (May/Nov)	Month 6 (lune/Dec)	Total
CN	-0-	59,807	61,103	62,495	63,603	64,638	311,646
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**************************************							
· · · · · · · · · · · · · · · · · · ·	<u> </u>						
····		<del> </del>			<u> </u>	<u> </u>	
***************************************							

the legal name as it appears in Space B: DIRECTV, Inc. January 1 - June 30, 2005 SPACE D, PART 3 - Computation of the Royalty Fee 1. Enter the grand total "Superstations" for Private Home Viewing  $73,003,168 \times 20 = 5 14,600,633.60$ subscribers here and multiply by \$0.20 .... 2. Enter the grand total "Network" stations for Private Home Viewing  $54,348,378 \times .17 = $ 9,239,224.26$ subscribers here and multiply by \$0.17 ..... 3. Enter the grand total "Superstations" for Commercial Establishments 311.646 124,658.40 subscribers here and multiply by \$0.40 ...... 4. Interest Charge. Enter the amount from line 4, Space E, page 5 5. Add Lines 1-4. This is the satellite carrier's total royalty fee \_\_\_\_\_\_\$ Remit this amount in the form of an electronic payment; or certified check, cashier's check, or money order payable to Register of Copyrights. Do not send cash. We recommend electronic payment. Space E — Worksheet for Computing Interest You must complete this worksheet for those royalty fee payments submitted as a result of a late payment or underpayment. For an explanation of interest assessment, see page (iv) of the General Instructions. 1. Enter the amount of late payment or underpayment ...... 2. Multiply line 1 by the interest rate\* and enter the sum here ... 3. Multiply line 2 by the number of days late ..... × .00274 4. Multiply line 3 by .00274\*\*. Enter the amount here (unless \$5.00 or less) and on line 4, part 3, space D, (page 5) ..... (interest charge) \*Contact the Licensing Division at (202) 707-8150 for the interest rate for the accounting period in which the late payment or underpayment occurred. \*\*This is the decimal equivalent of 1/365, which is the interest assessment for one day late. NOTE: If you are filing this worksheet covering a Statement of Account already submitted to the Copyright Office, please list below the Owner, Address, and Accounting Period as given in the original filing.

ethe legal name as it appears in Space 8: DIRECTV, Inc. January 1 - June 30, 2005

Space F — Con	tact Information
ldentify an individual f	Michael Thornton  2230 East Imperial Highway  El Segundo, CA 90245
TELEPHONE NUMBER EMAIL (OPTIONAL)	(INCLUDE AREA CODE) (310) 964-4359
Space G — Sig	nature
I, the undersigned Owne examined this Statemer	runt must be signed in accordance with Copyright Office regulations.  er or Agent of the Satellite Carrier, or Officer or Partner, if the Satellite Carrier is a corporation or partnership, have not of Account and hereby declare under penalty of law that all statements of fact contained herein are true, complete, of my knowledge, information, and belief, and are made in good faith. [18 U.S.C., Section 1001 (1986)]  Michael Thornton  Senior Vice President Programming Acquisitions
DATE	

### DIRECTV, INC. SCHEDULE A

### Details for Form SC, Page 2, SPACE C - PRIMARY TRANSMITTERS: TELEVISION For The Accounting Period From January 1 to June 30, 2005

1. Call Sign	2. Channel 3. Station Type Number (S or N)		4. Location of Station	
WGN	9	S	Chicago	
KWGN	2	S	Denver	
WABC	7	N	New York	
WCBS	2	N	New York	
WNBC	4	N	New York	
WNYW	5	N	New York	*************
KABC	7	N	Los Angeles	
KCBS	2	N	Los Angeles	
KNBC	4	N	Los Angeles	***********
KTTV	11	N	Los Angeles	
KBEJ	2	N	San Antonio	
WJAN	41	N	West Palm Beach	
WFDC	14	N	Washington DC	
KFTR	46	N	Los Angeles	
WAMI	69	N	Miami	
WXFT	60	N	Chicago	
KTNC	42	N	San Francisco	
WBQC	25	N	Cincinnati	
KDF	47	N	Corpus Christi	
WLBT	7	N	Jackson	
KGO	7	N	San Francisco	
WTIC	61	N	Hartford	
WAU	21	, N	Orlando	
KMSG	55	N	Fresno	^ <del></del>
WBZL	39	N	Miami - Fort Lauderdale	*****
KSWB	69	N	San Diego	*********
WABC1	7-1	N	New York	**********
WCBS1	2-1	N	New York	
WNBC1	4-1	N	New York	***********
WNYW1	5-1	N	New York	**********
KABC1	7-1	N	Los Angeles	
KCBS1	2-1	N	Los Angeles	***********
KNBC1	4-1	N	Los Angeles	
KTTV1	11-1	N	Los Angeles	

### DIRECTV, INC. SCHEDULE B

## Details for Form SC, Page 4, SPACE D - COPYRIGHT ROYALTY FEE PART 1 - CARRIAGE FOR PRIVATE HOME VIEWING

For The Accounting Period From January 1 to June 30, 2005

NETWO	NETWORK STATIONS - ANALOG & DIGITAL (PRIVATE HOME VIEWING)							
	SUBS	CRIBERS FO	OR EACH MO	ONTH OF AC	COUNTING P	ERIOD		
CALL SIGN	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6	Total	
	JAN	FEB	MAR	APR	MAY	JUNE		
WABC	860,556	847,371	833,520	808,011	783,956	773,809	4,907,223	
WCBS	816,549			769,084	746,350	736,867	4,666,253	
WNBC	829,030	814,494	799,135	773,718	749,533	740,009	4,705,919	
WNYW	1,020,248	1,010,216	994,763	969,619				
KABC	799,005	785,897	772,257	747,536	724,318	714,753	4,543,766	
KCBS	771,572	759,575	747,417	724,308	702,027	692,899	4,397,798	
KNBC	777,659	765,182	752,199	727,216	703,504			
KTTV	1,033,144	1,023,385	1,007,723	982,202	957,117	943,636	5,947,207	
KBEJ	44,964	44,079	44,783	45,234	45,565			
WJAN	261,604	266,937	272,587	276,654				
WFDC	121,894	123,501	126,075					
KFTR	62,121							
WAMI	120,413	121,869	123,128	123,496	123,488	123,434	735,828	
WXFT	89,374			88,795			531,481	
KTNC	203,067	202,872						
WBQC	30,067	31,957						
KDF	25,375							
WLBT	26,343							
KGO	15,530							
WTIC	11,531	12,730						
WAU	198,055							
KMSG	14,344		16,031					
WNYW	7,187	8,501						
WBZL	421,034							
KSWB	104,658							
WABC1	63,218							
WCBS <sub>1</sub>	84,879							
WNBC1	86,123							
WNYW1	146,414							
KABC1	42,074					42,546		
KCBS1	44,043							
KNBC1	32,389							
KTTV1	39,113		40,716					
	(	Grand total *N	etwork Static	ons" subscrib	ers (Private Ho	me Viewing):	54,348,378	

#### SX Exhibit 261 DP

If you are filing for a prior accounting period, contact the Licensing Division for the correct form.



## OFFICIAL BUSINESS UNITED STATES COPYRIGHT OFFICE

Filing Deadline: The Statement of Account must be filed within 30 days after the last day of the accounting period. The filing deadline is July 30 for the January-June accounting period and January 30 for the July-December accounting period.

#### STATEMENT OF ACCOUNT for Secondary Transmissions by SATELLITE CARRIERS FOR PRIVATE HOME VIEWING

General Instructions are at the end of this form [pages i-iv]

SPACE A

FOR COPYRIGHT	FOR COPYRIGHT OFFICE USE ONLY					
DATE RECEIVED	AMOUNT	Remin to: Library of Congress				
AUG 0 4 2005 RECEIVED	\$ REMITTANCE NUMBER	Copyright Office Licensing Division 101 Independence Ave., S.E. Washington, DC 20557-6400 (202) 707-8150  Deliveries to LM-458 8:30 am - 5:00 pm				

PACE B		
the satellite car	F SATELLITE CARRIER: Your file is established under this name. Give the full name of the cier. If the owner is a subsidiary of another corporation, give the full corporate title of the subsider.	
	ent corporation.	
LEGAL NAM	OF OWNER OF SATELLITE CARRIER  DIRECTU LATILL EMERICA	
	ME OF OWNER, IF DIFFERENT	

#### SPACE C

PRIMARY TRANSMITTERS: TELEVISION— In this area, please identify—every television broadcast station, including the Pubic Broadcasting Service satellite feed, carried by the SATELLITE CARRIER during this accounting period. DO NOT list program services such as HBO, ESPN, TBS or CNN. Exception: For the Public Broadcasting Service satellite feed, enter "PBS Feed" in column 1. "S" in column 3, and leave columns 2 and 4 blank. The PBS Feed is classified as a superstation, except it is treated as a network station for purposes of computing the royalty fee.

- · Column 1: List each station's call sign.
- . Column 2: Give the number of the channel on which the station's broadcasts are carried in its own community.
- Column 3: Indicate whether the station is a "superstation" or a "network" station by entering the letter "5" (for superstation) or "N" (for network). See page if of the General Instructions for the meaning of these terms.
- Column 4: Give the location of each station. This should be the community (city and state) to which the station is licensed by the FCC.

1. Call Sign	2 Channel Number	3. Station Type (5 or N )	4. Locanon of Station
WABC	172	N	NY, NY
WNBC.	176	N	NJ NJ
WCB5	174	[	1 NJ NJ
WPIX	178	N	Ny Ny
MNNW	170	N	Ny Ny
	ĺ		

#### SPACE D—COPYRIGHT ROYALTY FEE

GENERAL: In this space, report the number of subscribers receiving each television broadcast superstation and network station retransmitted outside the station's "local market." For the definition of a station's "local market," see page (iii) of the General Instructions.

The subscriber information must be reported for each month of the accounting period. The stations should be grouped together according to whether they are "superstations" or "network" stations as identified in Space C. Then, compute the total royalty fee in Part 2.

#### PART 1—CARRIAGE

• FIRST: Under the headings SUPERSTATIONS and NETWORK STATIONS, enter those stations' call signs and the number of subscribers receiving those stations on the last day of each month of the accounting period. Then, for each station, total the number of subscribers for all six months of the accounting period and enter that figure under the column labeled TOTAL.

NOTE: Do not include those subscribers receiving a superstation retransmitted within that station's "local market" nor those subscribers receiving a network station retransmitted within that station's "local market" to subscribers residing in "unserved households." See page (ii) of the General Instructions for a definition of these terms.

NEXT: Compute the grand total number of subscribers receiving "superstations" and "network" stations.

	SUPERSTATIONS									
		5UBSCR	IBERS FOR EAC			S PERIOD				
Call signs	Month I (lan/July)	Month 2 (Feb/Aug)	Month 3 (Mar/Sept)	Month 4 (Apr/Oct)	Month 5 (May/Nov)	Month 6 (Jame/Dec)	Total			
WPIX	135,487	132363	O	0	0	0	267,845			
	2-1									
					-					
<del></del>					}	<u> </u>				
						<del> </del>				
				<u> </u>	<u> </u>	<u> </u>				
				Gran	d 1013) "Superstat	ions" subscribers	1267.845			
Ì							·			
	,	SURSCI	NETWORK RIBERS FOR EAC	STATIONS &	IND PRS FEED	C PERION	T			
Callsigns	! Month 1	Month 2	Month 3	Month 4	Month 5	Month 6	Total			
Contragna	(jan/july)	(Feb/Aug)	(Mar/Sept)	(Apr/Oct)	(May/Nov)	(Sune/Dec)	10141			
VICES	1:35,482	132363	133,263	131897	131,030	129.734	793,769			
WUBC	135482	132 343	133763	13(897	131,03C	129.732	793 716			
:WABC	135482	132,363		131897	131,030	179 734	702 7/8			
· vl. hivl	135482	132,363	133763		131,030	129 734	-G1 716			
· MANAKI	1 700	130,000	117665	171.817	121050	139	F15, 781			
1										
-	<del></del>									
			····							
-										
			Crand to	nal "Network" sta	tions and "PBS F	eed" subscribers:	3,175,076			
PART 2-0	ግፖን እ ያገር ነ	TIONIOE	THE DO	VAITW EE	ic:					
1. Enter the gr			THE RO	ivel i LE	£		•			
1. there are gr	subs	erstanou <b>s</b> cribers here ar	nd multiply by	50.1890	Z67 80	x.1890 = \$	50,622.7			
2. Enter the gr	and total "Nen	work" stations	and TPBS Fee	ď".	2176		1-71 1000-			
-	subs	cribers here ar	id multiply by	\$0.1485	545,070	Cx .1485 = \$_	4+1,458,4			
2 Instructs Ch					•		Ø			
3. Interest Cha	orke riner me	amomit Honri	um a, upace E,	hake a						
4. Add Lines	1, 2, and 3. This	is the satellite	carrier's total	royalty fee	\$	-522	2.121.50			
					1					
		nec behaveor; or extr	thed check, cushum's	s check or money or	ver payable 10 ine R	eguser of Copyrights	Do not send cash, we			
recommend electron	н раупили.									

Give the legal name as it appears in Space B.	
SPACE E—WORKSHEET FOR COMPUTING INTEREST You must complete this worksheet for those royalty fee payments submitted as a result underpayment For an explanation of interest assessment, see page (iii) of the General Instruct	of a late payment or tions.
Line 1. Enter the amount of late payment or underpayment	\$
	*%
Line 2. Multiply line 1 by the interest rate* and enter the sum here.	Y Y Y gyptalleaghauphauphauphaidheadhauphaidheaghauphauphauphaidheaghauphauphaidheaghaupha
	xdays
Line 3. Multiply line 2 by the number of days late	x.00274
Line 4. Multiply line 3 by .00274**. Enter the amount here	1.002/3
(unless \$5.00 or less) and on line 3, part 2, space D, (page 3)	· · · ·\$
*Contact the Licensing Division at (202)707-8150 for the interest rate for the accounting period in or underpayment occurred.	(interest charge)
*"This is the decimal equivalent of 1/365, which is the interest assessment for one day late.	
NOTE: If you are filing this worksheet covering a Statement of Account already submitted to please list below the Owner, Address, and Accounting Period as given in the original filing.	to the Copyright Office.
SPACE F— Identify an individual to whom we can write or call about this Statement of A	Account:
NAME FEON MATRIALS  MAILING ADDRESS 21. AVE OF THE PAINCRICHS 6TH F.	
TELEPHONE NUMBER (INCLUDE AREA CODE) 212 462 - 3052	
SPACE G—The Statement of Account must be signed in accordance with Copyright Office.  I, the undersigned Owner or Agent of the Satellite Carrier, or Officer or Partner, if the Satellite or partnership, have examined this Statement of Account and hereby declare under penalty of fact contained herein are true, complete, and correct to the best of my knowledge, information made in good faith. [18 U.S.C., Section 1001(1986)]  SIGNATURE  TYPED OR PRINTED NAME  If CL  MATKING  TITLE OR CAPACITY  ALPLY SY	lite Carrier is a corpora- of law that all statements ion, and belief, and are
DATE	

### US Copyright (CBS, NBC, ABC, FOX (WNYW)

Jan/05 - Jun/05 July 31, 2005 \$0.1485

Period: Due Date: Sub Fee: Number of Networks:

0,0%

Interest Rate:

Actual Payment	Month	EOP Subscribers	Fee	Rate for Late pmt	# of Networks	Total Amt	Due to US Copyright
	Jan-05	135,482	\$0.14850	0.00%	4	\$80,476.31	\$80,476.31
	Feb-05		\$0.14850	0.00%	4	\$78,623.62	\$78,623.62
	Mar-05 Apr-05	133,263	\$0.14850	0.00%	4	\$79,158.22 \$78,346.82	\$79,158.22 \$78,346.82
	May-05	131,897 131,030	\$0.14850 \$0.14850	0.00% 0.00%	4	\$77,831.82	\$77,831.82
	Jun-05	129,734	\$0.14850	0.00%	4	\$77,062.00	\$77,062.00
	Int rate late charge					\$0.00	\$0.00
	TOTAL	793,769					
	TOTAL * 4 NETWORKS	3,175,076					\$471,498.79

DTVLA Per GL	Month	AVG Subscribers	Fee	Rate for Late pmt	# of Networks	Total Amt	Due to US Copyright
	Jan-05	134,593	\$0.14850	0.00%	4	\$79,948.24	\$79,948.24
	Feb-05	133,923	\$0.14850	0.00%	4	\$79,550.26	\$79,550.26
	Mar-05	132,813	\$0.14850	0.00%	4	\$78,890.92	\$78,890.92
	Apr-05	132,580	\$0.14850	0.00%	4	\$78,752.52	\$78,752.52
	May-05	131,464	\$0.14850	0.00%	4	\$78,089.62	\$78,089.52
	Jun-05	130,382	\$0.14850	0.00%	4	\$77,446.91	\$77,446.91
	Int rate late charge TOTAL	795,755					\$0.00
	TOTAL * 4 NETWORKS	3,183,020					\$472,678.47
						Variance	-\$1,179.68

US Copyright WPIX

Jan/05 - Jun/05 June 30, 2004 \$0.1890 1 0.0%

Period; Due Date; Sub Fee: Number of Networks; Interest Rate;

Actual Payment	Month		EOP Subscribers	Fee	Rate for Late pmt	# of Networks	Total Amt	Due to US Copyright
	-	Jan-05	135,482	\$0,18900	0.00%	1	\$25,606.10	\$25,606.10
	1	Feb-05	132,363	\$0.18900	0.00%	1	\$25,016.61	\$25,016.61
		Mar-05	0	\$0.18900	0.00%	1	\$0.00	\$0.00
•		Apr-05	0 -	\$0.18900	0.00%	1	\$0.00	\$0.00
•	1	1ay-05	Q	\$0.18900	0.00%	i	\$0.00	\$0.00
i	:	Jun-05	0	\$0.18900	0,00%	1	\$0.00	\$0.00
	Int rate late charge						\$0,00	\$0.00
	TOTAL		267,845					\$50,622.71

DTVLA Per GL	Month	·	AVG Subscribers	Fee	Rate for Late pmt	# of Networks	Total Amt	Due to US Copyright
		Jan-05	134,593	\$0.18900	0.00%	1	\$25,438.08	\$25,438.08
		Feb-05	133,923	\$0.18900	0.00%	1	\$25,311.45	\$25,311.45
		Mar-05	0	\$0.18900	0.00%	1	\$0.00	\$0.00
		Apr-05	0	\$0.18900	0.00%	i	\$0.00	\$0,00
		May-05	0	\$0.18900	0.00%	1	\$0.00	\$0.00
		Jun-05	0	\$0.18900	0.00%	1	\$0.00	\$0,00
	Int rate late charge TOTAL	-	268,516		\$0.00			\$0,00 \$50,749.52
							Variance	-\$126.82

STATEMENT OF ACCOUNT

#### IF YOU ARE FILING FOR A PRIOR ACCOUNTING PERIOD, CONTACT THE LICENSING DIVISION FOR THE CORRECT FORM.

FOR COPYRIGHT OFFICE USE ONLY

SA1-2

**Short Form** 

for Secondar Cable Systen		insmissions by his instance in the control of the c	DATE RECEIVED	AMOUNT \$	Short Form Return to: LIBRARY OF CONGRESS COPYRIGHT OFFICE					
General Instruct end of this form		£ 1	MAI: 1 2005	ALLOCATION NUMBER	LICENSING DIVISION 101 INDEPENDENCE AVE., S.E. WASHINGTON, DC 20557-6400 (202) 707-8150					
		t to		729587	[Deliveries to LM-458] 8:30 to 5:00					
Accounting Period	1	COUNTING PERIOD COV	ERED BY THIS STATEMENT STA	NT:						
B Owner	infon	INSTRUCTIONS:  Your file has been established under the information given below. If there are any changes, draw a line through the incorrect information and print or type the correct information beside it.  Give the full legal name of the owner of the cable system. If the owner is a subsidiary of another corporation, give the full corporate title of the subsidiary, not that of the parent corporation.  List any other name or names under which the owner conducts the business of the cable system.								
	1	AL NAME OF OWNER/MAIL Laxy Cable Inc.	ING ADDRESS OF CABLE S	/STEM:	025107					
	Ga.	taxy cable inc.								
	1 1	laxy Cablevisio Montgomery Bank Ceston, MO 638	Plaza, 4th Flo	or 02	25107042					
С	INST	RUCTIONS: In line 1, give a es already appear in space 8.	ny business or trade names use In line 2, give the mailing addr	ed to identify the business and operati ess of the system, if different from the	on of the system unless these address given in space B.					
System	1	IDENTIFICATION OF CAB	LE SYSTEM:							
		MAILING ADDRESS OF CA	ABLE SYSTEM:							
	2		(Number, Street, Rural F	Rouse, Apartment or Sulta Number)						
	<u> </u>			on, Stato, ZIP Code)						
D Area Served	in FC areas form	C rules: "a separate and on sand including single, discrete of system identification here.	listinct community or municipal e unincorporated areas.") 47 C. reafter known as the "First C	e system, A 'community' is the same as entity (including unincorporated comm F.R. §76.5(mm). The first community community." Pleaso use it as the Firmoble home parks should be reported in pa	nunities within unincorporated to that you list will serve as a ret Community on all future					
	city.	CITY OR TOWN	STATE	CITY OR TOWN	STATE					
First >	Eag	jle	NE							
Community	lunity									
		***************************************		,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,						
		.,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,		************************************						
				er fil fil gigg gilg gilg gilg gilg er prins fil fil fil gilg gilg fil gilg gilg fil fil gilg gilg						
i										
	NOT	ICE: This form has been	electronically photo-repro	duced by GRALIN associates, inc						

LEGAL NAME OF CONNER OF CABLE SYSTEM:

GALAXY CABLE INC.

025107

Name

#### SECONDARY TRANSMISSION SERVICE: SUBSCRIBERS AND RATES

In General: The information in space E should cover all categories of "secondary transmission service" of the cable system: that is, the retransmission of television and radio broadcasts by your system to subscribers. Give information about other services (including pay cable) in space F, not here. All the facts you state must be those existing on the last day of the accounting period (June 30 or December 31, as the case may be).

Number of Subscribers: Both blocks in space E call for the number of subscribers to the cable system, broken down by categories of secondary transmission service. In general, you can compute the number of "subscribers" in each category by counting the number of billings in that category (the number of persons or organizations charged separately for the particular service at the rate indicated—not the number of sets receiving service).

Rate: Give the standard rate charged for each category of service. Include both the amount of the charge and the unit in which it is generally billed. (Example: "\$8/mth"). Summarize any standard rate variations within a particular rate category, but do not include discounts allowed for advance payment.

Block 1: In the left-hand block in space E, the form lists the categories of secondary transmission service that cable systems most commonly provide to their subscribers. Give the number of subscribers and rate for each listed category that applies to your system. Note: Where an individual or organization is receiving service that falls under different categories, that person or entity should be counted as a "subscriber" in each applicable category. Example: a residential subscriber who pays extra for cable service to additional sets would be included in the count under "Service to the First Set," and would be counted once again under "Service to Additional Set(s)."

Block 2: If your cable system has rate categories for secondary transmission service that are different from those printed in block 1, (for example, tiers of services which include one or more secondary transmissions), list them, together with the number of subscribers and rates, in the right-hand block. A two or three word description of the service is sufficient.

BLOCK	1		BLOCK 2				
CATEGORY OF SERVICE	NO. OF SUBSCRIBERS	RATE	CATEGORY OF SERVICE	NO. OF SUBSCRIBERS	RATE		
Residential: • Service to First Set	191	40.45					
Motel, Hotel							
Converter Residential	1	2.00					
	ľ	, ,					

#### SERVICES OTHER THAN SECONDARY TRANSMISSIONS: RATES

In General: Space F calls for rate (not subscriber) information with respect to all your cable system's services that were not covered in space E. That is, those services that are not offered in combination with any secondary transmission service for a single fee. There are two exceptions; you do not need to give rate information concerning: (1) services furnished at cost; and (2) services or facilities furnished to nonsubscribers. Rate information should include both the amount of the charge and the unit in which it is usually billed. If any rates are charged on a variable per-program basis, enter only the letters"PP" in the rate column.

Block 1: Give the standard rate charged by the cable system for each of the applicable services listed.

Block 2: List any services that your cable system furnished or offered during the accounting period that were not listed in block 1 and for which a separate charge was made or established. List these other services in the form of a brief (two or three word) description, and include the rate for each.

	BLOCK 1						
CATEGORY OF SERVICE	ATEGORY OF SERVICE RATE CATEGORY OF SERVICE RATE						
Pay Cable—Add'l Channel Fire Protection Burglar Protection  Parallation: Residential	35.00	Other Services:  Reconnect  Disconnect  Outlet Relocation	19.95		 		

E

Secondary transmission Service: Subscribers and Rates

F

Services
Other Than
Secondary
Transmissions:
Rates

	INSTRUCTIONS:	
Namo	GALAXY CABLE INC.	025107
	LEGAL NAKE OF OWNER OF CABLE SYSTEM:	

Primary Transmitters: Television

General: In space G, identify every television station (including translator stations and low power television stations) carried by your cable system during the accounting period, except: (1) stations carried only on a part-time basis under FCC rules and regulations in effect on June 24, 1981 permitting the carriage of certain network programs [sections 76.59(d)(2) and (4), 76.61(e)(2) and (4) or 76.63 (referring to 76.61(e)(2) and (4))]; and (2) certain stations carried on a substitute program basis, as explained in the next paragraph.

Substitute Basis Stations: With respect to any distant stations carried by your cable system on a substitute program

- basis under specific FCC rules, regulations, or authorizations:

   Do not list the station here in space G—but do list it in space I (the Special Statement Program Log)—if the station was carried only on a substitute basis.
- · List the station here, and also in space I, if the station was carried both on a substitute basis and also on some other basis. For futher information concerning substitute basis stations, see page (v) of the General Instructions.

Column 1: List each station's call sign. Do not report program services such as HBO, ESPN, etc.

Column 2: Give the number of the channel on which the station's broadcasts are carried in its own community. This

may be different from the channel on which your cable system carried the station.

Column 3: Indicate in each case whether the station is a network station, an independent station, or a noncommercial educational station, by entering the letter "N" (for network), "I" (for independent) or "E" (for noncommercial educational).

For the meaning of these terms, see page (iv) of the General Instructions.

Column 4: Give the location of each station. For U.S. stations, list the community to which the station is licensed by the FCC. For Mexican or Canadian stations, if any, give the name of the community with which the station is identified.

1. CALL SIGN	2. B'CAST CHANNEL NUMBER	3. TYPE OF STATION	4. LOCATION OF STATION
KETV	7	Ŋ	Omaha
KLKN	8	N	Utica
KMTV	3	N	Omaha
KOLN	10	N	Lincoln
KPTM	42	I	Omaha
KSNB	4	I	Superior
KUON	12	E	Lincoln
KXVO	15	I	Omaha -
WGN	9	I	SUPERSTATION, Chicago
WOWT	6	N	Omaha
		***********	
••••	•••••		
		• • • • • • • • • • • • • • • • • •	

FORM SA1-2. PA	AGE 4,							
LEGAL NAME OF OWNER OF CABLE SYSTEM:  GALAXY CABLE INC. 025107								Namo
PRIMARY TRANSMITTERS: RADIO In General: List every radio station carried on a separate and discrete basis and list those FM stations carried on an all-band basis whose signals were "generally receivable" by your cable system during the accounting period.  Special Instructions Concerning All-Band FM Carriage: Under Copyright Office Regulations, an FM signal is "generally receivable" if: (1) "it is carried by the system whenever it is received at the system's headend"; and (2) it can be expected, on the basis of monitoring, to be received at the headend, with the system's FM antenna, during certain stated intervals. For detailed information about the the Copyright Office Regulations on this point, see page (iv) of the General Instructions.  Column 1: Identify the call sign of each station carried.  Column 2: State whether the station is AM or FM.  Column 3: If the radio station's signal was electronically processed by the cable system as a separate and discrete signal, indicate this by placing a check mark in the "S/D" column.  Column 4: Give the station's location (the community to which the station is licensed by the FCC or, in the case of Mexican or Canadian stations, if any, the community with which the station is identified).								Primery Transmitters: Rødio
CALL SIGN	AM or FM	S/D	LOCATION OF STATION	CALL SIGN	AM or FM	S/D	LOCATION OF STATION	
								·

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LEGAL MALE OF CHANGE OF CARLE SYSTEM. Nama 025107 GALAXY CABLE INC. GENERAL: In space I, identify every nonnetwork television program, broadcast by a distant station, that your cable system carried on a substitute basis during the accounting period, under specific present and former FCC rules, regulations. or authorizations. For a further explanation of the programming that must be included in this log, see page (v) of the General Substituto Instructions. Carriage: Special 1. SPECIAL STATEMENT CONCERNING SUBSTITUTE CARRIAGE: Statement and During the accounting period, did your cable system carry, on a substitute basis, any nonnetwork television program Propram Loo broadcast by a distant station? ☐ Yes ŇΝα Note: If your answer is "No", leave the rest of this page blank. If your answer is "Yes", you must complete the program log in block 2. 2. LOG OF SUBSTITUTE PROGRAMS: In General: List each substitute program on a separate line. Use abbreviations wherever possible, if their meaning is clear. If you need more space, please attach additional pages. Column 1: Give the title of every nonnetwork television program ("substitute program") that, during the accounting period, was broadcast by a distant station and that your cable system substituted for the programming of another station under certain FCC rules, regulations, or authorizations. See page (v) of the General Instructions for further information. Do not use general categories like "movies" or "basketball," List specific program titles, for example, "I Love Lucy" or "NBA Basketball: 76ers vs. Bulls\*. Column 2: If the program was broadcast live, enter "Yes". Otherwise enter "No". Column 3: Give the call sign of the station broadcasting the substitute program. Column 4: Give the broadcast station's location (the community to which the station is licensed by the FCC or, in the case of Mexican or Canadian stations, if any, the community with which the station is identified). Column 5: Give the month and day when your system carried the substitute program. Use numerals, with the month first. Example: for May 7 give "5/7", Column 6: State the times when the substitute program was carried by your cable system. List the times accurately to the nearest five minutes, Example: a program carried by a system from 6:01:15 p.m. to 6:28:30 p.m. should be stated as "6:00-6:30 p.m." Column 7: Enter the letter "R" if the listed program was substituted for programming that your system was required to delete under FCC rules and regulations in effect during the accounting period; or enter the letter "P" if the listed program was substituted for programming that your system was permitted to delete under FCC rules and regulations in effect on October 19, 1976. WHEN SUBSTITUTE SUBSTITUTE PROGRAM CARRIAGE OCCURRED 7. REASON FOR DELETION 2. LIVE? 3. STATION'S 6. TIMES 5 MONTH 1. TITLE OF PROGRAM Yes or No CALL SIGN 4. STATION'S LOCATION AND DAY

LEGAL NAME OF OWNER OF CABLE SYSTEM GALAXY CABLE INC. 025107	Name
GROSS RECEIPTS Instructions: The figure you give in this space determines the form you file and the amount you pay. Enter the total of all amounts ("gross receipts") paid to your cable system by subscribers for the system's "secondary transmission	K
service* (as identified in space E) during the accounting period. For a further explanation of how to compute this amount, see page (v) of the General Instructions.	Gross Receipt
• Gross receipts from subscribers for secondary transmission service(s) during the accounting period	
INSTRUCTIONS FOR COMPUTING THE COPYRIGHT ROYALTY FEE	1
To compute the royalty fee you owe:	<b>L.</b>
<ul> <li>Complete either block 1, block 2 or block 3</li> <li>Use block 1 if the amount of "gross receipts" in space K is \$98,600 or less</li> <li>Use block 2 if the amount of "gross receipts" in space K is more than \$98,600 but less than or equal to \$189,800</li> <li>Use block 3 if the amount of "gross receipts" in space K is more than \$189,800 but less than \$379,600</li> <li>See page (vi) of the General Instructions for more Information.</li> </ul>	Copyright Royalty Fee
BLOCK 1: "GROSS RECEIPTS" OF \$98,600 OR LESS	
INSTRUCTIONS: As a cable system with "gross receipts" of \$98,600 or less, the royalty fee that you must pay for this six-month accounting period is \$37,00	
Line 1. Royalty Fee for Accounting Period	
Line 2. Interest Charge. Enter the amount from line 4, space Q, page 8	
Line 3. TOTAL ROYALTY FEE PAYABLE FOR ACCOUNTING PERIOD. Add lines 1 and 2	
BLOCK 2: "GROSS RECEIPTS" OF \$189,800 OR LESS (but more than \$98,600)	
1. Base amount under statutory formula	
2. Enter amount of "gross receipts" from space K	
3. Subtract line 2 from line 1	
4. Enter the amount of "gross receipts" from space K	
5. Enter the amount from line 3	
6. Subtract line 5 from line 4	
7. Multiply line 6 by .005 (enter figure here)	
8. Interest Charge. Enter the amount from line 4, space Q, page 8	
9. TOTAL ROYALTY FEE PAYABLE FOR ACCOUNTING PERIOD. Add lines 7 and 8	
BLOCK 3: "GROSS RECEIPTS" OF MORE THAN \$189,800 (but less than \$979,600)	
1. Enter the amount of "gross receipts" from space K	
2. Base amount under statutory formula	
3. Subtract line 2 from line 1	
4. Multiply line 3 by .01	
5. Royalty due on the first \$189,800 of gross receipts (under statutory formula)	
6. Interest Charge. Enter the amount from line 4, space Q, page 8	
7. TOTAL ROYALTY FEE PAYABLE FOR ACCOUNTING PERIOD. Add lines 4, 5, and 6	

Name	LEGAL NAME OF OWNER OF CABLE SYSTEM: GALAXY CABLE INC.	025107			
N Channels	CHANNELS INSTRUCTIONS: You must give: (1) the number of channels on which the cable system carrestations to its subscribers; and, (2) the cable system's total number of activated channels, during	ied television broadcast g the accounting period.			
	Enter the total number of channels on which the cable system carried television broadcast stations.	10			
	Enter the total number of activated channels on which the cable system carried television broadcast stations and nonbroadcast services.	95			
N	INDIVIDUAL TO BE CONTACTED IF FURTHER INFORMATION IS NEEDED: (Identive can write or call about this Statement of Account.)	ify an individual to whom			
Contact	Nameeieprione	73-472-8200 se Code)			
	(Number, Street, Rural Route, Apartment or Suite Number)				
	Sikeston, MO 63801 (City, Town, State, ZIP Code)				
0	CERTIFICATION: (This Statement of Account must be certified and signed in accordance Regulations, as explained in the General Instructions.)	ce with Copyright Office			
Certification	• i, the undersigned, hereby certify that: (Check one, but only one, of the boxes.)				
:	☐ (Owner other than corporation or partnership) I am the owner of the cable system as id B; or	dentified in line 1 of space			
	(Agent of owner other than corporation or partnership) I am the duly authorized a cable system as identified in line 1 of space B, and that the owner is not a corporation				
	Ø (Officer or partner) I am an officer (if a corporation) or a partner (if a partnership) of the owner of the cable system in line 1 of space B.	legal entity identified as			
· 	<ul> <li>I have examined the Statement of Account and hereby declare under penalty of law the contained herein are true, complete, and correct to the best of my knowledge, information, and good faith. [18 U.S.C., Section 1001(1986)]</li> </ul>	at all statements of fact belief, and are made in			
	Handwritten signature: (X)				
	Typed or printed name:Larry Eby	,			
	Title:	ership)			
	Date:				

PRIVACY ACT ADVISORY STATEMENT-Required by Privacy Act of 1974 (Public Law 93-579)

But If the Information is Not Furnished;

Note: The Information is Not Furnished;

Record of Statements of Account in the completed record of Statements of Account.

Authority for Requesting This Information:

O Tile 17, U.S.C. §111

Furnishing This Information is:

O Voluntary

O You may be sable for copyright intringement with respect to retransmission of latevision and radio stations (17 U.S.C. §5502-508, 509-810)

Principal Uses of Requested Information:

6 Establishment and maintenance of a public record.

Examination of the Statement of Account for compliance with legal requirement

Other Routine Uses:

• Public Inspection and copying
• Preparation of public indexes
• Preparation of search reports upon

Note:

No other advisory statement will be given you in connection with this Statement of Account

Please retain a copy of this statement and refor to it if we communicate with you regarding this Statement of Account

LEGAL NAME OF OWNER OF CAPLE SYSTEM:		<u> </u>
GALAXY CABLE INC.	025107	N
SPECIAL STATEMENT CONCERNING GROSS REC	CEIPTS EXCLUSION	
The Satellite Home Viewer Act of 1988 amended Title 17, secti	on 111(d)(1)(A), of the Copyright Act by adding the following	1
sentence:  "In determining the total number of subscribers and the group of providing secondary transmissions of primary broadcast and amounts collected from subscribers receiving second section 119."	st transmitters, the system shall not include subscribers	Stater Gross I
For more information on when to exclude these amounts, se	ee the note on page (v) of the General Instructions.	
During the accounting period did the cable system exclude a made by satellite carriers to satellite home "dish" owners?	ny amounts of gross receipts for secondary transmissions	
D YES. Enter the total here	\$	
and list the satellite carrier(s) below.		
Name		
Mailing Address		
,	,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	
Name	Nerpe	
Name Mailing Address	MatEng Address	
	,	
		<u> </u>
		C
You must complete this worksheet for those royalty payments For an explanation of interest assessment, see page (vi) Ge	s submitted as a result of a late payment or underpayment. neral Instructions.	inte
You must complete this worksheet for those royalty payments For an explanation of interest assessment, see page (vi) Ge.  Line 1. Enter the amount of late payment or underpayment.	neral Instructions.	inte
For an explanation of interest assessment, see page (vi) Ge	neral Instructions.	inte
For an explanation of interest assessment, see page (vi) Ge- Line 1. Enter the amount of late payment or underpayment.	neral Instructions.	Inte
For an explanation of interest assessment, see page (vi) Ge	neral Instructions.	inte
For an explanation of interest assessment, see page (vi) Ge- Line 1. Enter the amount of late payment or underpayment.	neral Instructions.	Inte
For an explanation of interest assessment, see page (vi) Ge- Line 1. Enter the amount of late payment or underpayment.  Line 2. Multiply line 1 by the Interest rate* and enter the sum	xdays	inte
For an explanation of interest assessment, see page (vi) Ge- Line 1. Enter the amount of late payment or underpayment.	xdays	Inte
For an explanation of interest assessment, see page (vi) Ge- Line 1. Enter the amount of late payment or underpayment.  Line 2. Multiply line 1 by the Interest rate* and enter the sum  Line 3. Multiply line 2 by the number of days late and enter the	x	Inte
For an explanation of interest assessment, see page (vi) Ge- Line 1. Enter the amount of late payment or underpayment.  Line 2. Multiply line 1 by the Interest rate* and enter the sum	x	inte
For an explanation of interest assessment, see page (vi) Geline 1. Enter the amount of late payment or underpayment.  Line 2. Multiply line 1 by the Interest rate* and enter the sum  Line 3. Multiply line 2 by the number of days late and enter the Line 4, Multiply line 3 by .00274** and enter here and in space.	x	inte
For an explanation of interest assessment, see page (vi) Geline 1. Enter the amount of late payment or underpayment.  Line 2. Multiply line 1 by the Interest rate* and enter the sum  Line 3. Multiply line 2 by the number of days late and enter the Line 4, Multiply line 3 by .00274** and enter here and in space.	X	inte
For an explanation of interest assessment, see page (vi) Getine 1. Enter the amount of late payment or underpayment.  Line 2. Multiply line 1 by the Interest rate* and enter the sum.  Line 3. Multiply line 2 by the number of days late and enter the sum.  Line 4. Multiply line 3 by .00274** and enter here and in spacifice 2, or Block 2, line 8, or Block 3, line 6	x	inte
For an explanation of interest assessment, see page (vi) Get.  Line 1. Enter the amount of late payment or underpayment.  Line 2. Multiply line 1 by the Interest rate* and enter the sum.  Line 3. Multiply line 2 by the number of days late and enter the line 4. Multiply line 3 by .00274** and enter here and in space line 2, or Block 2, line 8, or Block 3, line 6	x	inte
For an explanation of interest assessment, see page (vi) Getine 1. Enter the amount of late payment or underpayment.  Line 2. Multiply line 1 by the Interest rate* and enter the sum.  Line 3. Multiply line 2 by the number of days late and enter the sum.  Line 4. Multiply line 3 by .00274** and enter here and in space line 2, or Block 2, line 8, or Block 3, line 6	x	Into: Assoss

## SX Exhibit 263 DP

# IF YOU ARE FILING FOR A PRIOR ACCOUNTING PERIOD, CONTACT THE LICENSING DIVISION FOR THE CORRECT FORM.

## STATEMENT OF ACCOUNT \*

for Secondary Transmissions by Cable Systems (Short Form)

General Instructions are at the end of this form [pages (i)-(vi)].

FOR COPYRIGH	T OFFICE USE ONLY
- DATE RECEIVED	AMOUNT
LICENSING ORASION	\$
FEB 2 8 2005	ALLOCATION NUMBER
RECEIVED	

SA1-2 Short Form

Return to:
UBRARY OF CONGRESS
COPYRIGHT OFFICE
LICENSING DIVISION
101 INDEPENDENCE AVE., S.E.
WASHINGTON, DC 20557-6400
(202) 707-8150

[Deliveries to LM-458] 8:30 to 5:00

<del></del>	<del></del>	····		<del></del>						
A	ACCOUNTING PERIOD COVERED	BY THIS STATEME	NT:							
Accounting	July 1 - December 31, 2004	•		. *						
Period			•							
Bowner	information and print or type the correct Give the full legal name of the owne title of the subsidiary, not that of the pen	information beside it. or of the cable system. If the capporation. er which the owner condi-	below. If there are any changes, draw a line owner is a subsidiary of another corporations the business of the cable system.  YSTEM:							
	1500 MARKET STREET	039632 2004/2								
	PHILADELPHIA, PA 19102-2148									
С	INSTRUCTIONS: In line 1, give any bus names already appear in space B. In line	iness or trade names us e 2, give the mailing add	ed to identify the business and operation of ress of the system, if different from the addr	the system unless these ess given in space B.						
System	1 IDENTIFICATION OF CABLE SY	/STEM:								
	COMCAST OF VIRGINIA, INC.									
	MAILING ADDRESS OF CABLE SYSTEM:									
	18067 JEFFERSON DAVIS.	HWY								
	2 (Number, Street, Rural Route, Apartment or Suite Number)									
	LADYSMITH, VA 22501. (City, Town, State, 22º Code)									
D Aren Served	in FCC rules: " a separate and distinct areas and including single, discrete unint form of system identification hereafte fillings.	community or municipal corporated areas.") 47 C. r known as the "First C	le system. A "community" is the same as a "co entity (including unincorporated community F.R. §76.5(mm). The first community that community." Please use it as the First Co mobile home parks should be reported in parenth	es within unincorporated you list will serve as a community on all future						
	CITY OR TOWN	STATE	CITY OR TOWN	STATE .						
First ▶ Community										
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ORM SA1-2. PAGE 2.		<u></u>						ACCOUNT	NG PERIOD: 2004/2
LEGAL NAME OF OWNER OF CABLE SYSTEM	Æ.						SYSTE	EM ID#	Name
COMCAST OF VIRGINIA, IN	<u>C.</u>			~~~~				39632	
SECONDARY TRANSMISS In General: The information system: that is, the retransmission about other services (including particular services) (including particular of Subscribers: Educategory by counting the number for the particular service at the mate: Give the standard raunit in which it is generally billed category, but do not include dis Block 1: In the lett-hand block systems most commonly provide that applies to your system. No categories, that person or entity subscriber who pays extra for control of the systems most commonly provides that applies to your system. No categories, that person or entity subscriber who pays extra for control of the systems most control of the systems most control or entity subscriber who pays extra for control Edock 2: If your cable systems might block 1, (for example, with the number of subscribers existed in block 1, (for example, with the number of subscribers existed in such cases and such as the subscribers existence of th	n in space on in space on of teleproper of t	ee E shouk evision ar e) in space e) in space n service. gs in that cated—not llowed for eac ed for eac ple: "\$8/π llowed for ace E, the r subscribre ere an ind ec counted vice to add under "Se rate catege ervices wh	d cover all and radio be a F, not he are 71, as to a E call for In generategory (to the number of th	categories o roadcasts by ere. All the fat the case may the number of the number of the number of the categorie the categorie the categorie the categorie the categorie to organization scriber in eas s would be in dditional Set etcondary tra e one or mor	of "second y your syscitis you sty be). If subscript compute of persons occiving a linctude b standard in subscript a linctude in subscript in its received in the received in	ary transminer to substate must be been to the country transminer to the amorate variation and ary transminer the country transminer the country transminer the amorate variation and ary transminer than the country transminer than the country transminer transminer than to the country transminer than the country transminer than the country transminer than the country transminer transminer to the country transminer transminer than the country transminer transminer to the country transminer transminer to the country transminer transminer to the country transminer tran	scribers. Give info- those existing on able system, broke of "subscribers" ations charged sep ount of the charge on within a partice mission service the te for each listed of that falls under on. Example: a reconder "Service to the at are different from ssions), list them, the	mation the last an down in each parately and the plar rate at cable ategory different sidential the First methose ongether	Secondary transmission Service: Subscribers and Rates
BLOCK	1			F	····	BLOCK 2			
<u> </u>		. OF			<del></del>		NO. OF	<u> </u>	
CATEGORY OF SERVICE		RIBERS	RATE	CATEGOR	Y OF SE	RVICE	SUBSCRIBERS	RATE	
Residential:  Service to First Set  Service to Additional Set(s)  FM Radio (if separate rate).  Motel, Hotel		283	17.96				••••••		
Motel, Hotel						,,,,,,,,,,,,,	*************		
Commercial	ł		1	1					
Converter • Residential									
Non-Residential									
In General: Space F calls to were not covered in space E. The service for a single fee. There turnished at cost; and (2) service amount of the charge and the unenter only the letters "PP" in the Block 1: Give the standard Block 2: List any services the block 1 and for which a separ or three word) description, and	for rate ( at is, the are two are two ces or fa nit in wh rate coli I rate cha at your c ate chan	not subsci se service exceptions icilities fur ich it is usi umn. arged by the able syste ge was ma	riber) informs that are so tha	mation with not offered in not need to nonsubscrib it. If any rates system for ea ador offered	respect to a combine give rate sers. Rate s are char ach of the during the	ation with an information information ged on a va applicable accounting	ny secondary trans a concerning: (1) s n should include t nriable per-program services listed.	mission services both the n basis, otlisted	Services Other Than Secondary Transmissions: Rates
	BLOC	K1					BLOCK 2		•
CATEGORY OF SERVICE	RATE	CATEGO	RY OF S	ERVICE	RATE	CATEGO	RY OF SERVICE	RATE	
Additional Set(s)	-94.50 65-14	<ul> <li>Motel,</li> <li>Comm</li> <li>Pay C</li> <li>Pay C</li> <li>Fire Pi</li> <li>Burgla</li> <li>Other Se</li> </ul>	Hotel nercial able able—Ade rotection. r Protection	d'i Channel.					
FM Radio (If separate rate)     Converter	74-3.7	<ul><li>Discor</li><li>Outlet</li></ul>	nect Relocatio						-

Name

LEGAL NAME OF OWNER OF CABLE SYSTEM COMCAST OF VIRGINIA, INC. SYSTEM ID# 039632

G

Primary Transmitters: Television

#### **INSTRUCTIONS:**

General: In space G, identify every television station (including translator stations and low power television stations) carried by your cable system during the accounting period, except: (1) stations carried only on a part-time basis under FCC rules and regulations in effect on June 24, 1981 permitting the carriage of certain network programs [sections 76.59(d)(2) and (4), 76.61(e)(2) and (4) or 76.63 (referring to 76.61(e)(2) and (4))]; and (2) certain stations carried on a substitute program basis, as explained in the next paragraph.

Substitute Basis Stations: With respect to any distant stations carried by your cable system on a substitute program

basis under specific FCC rules, regulations, or authorizations:

• Do not list the station here in space G—but do list it in space I (the Special Statement Program Log)—if the station was carried only on a substitute basis.

List the station here, and also in space I, if the station was carried both on a substitute basis and also on some other basis. For futher information concerning substitute basis stations, see page (v) of the General Instructions.

Column 1: List each station's cell sign, the notice port programs some station of the community. This may be different from the channel on which your cable system carried the station.

Column 3: Indicate in each case whether the station is a network station, an independent station, or a noncommercial educational station, by entering the letter "N" (for network), "I" (for independent) or "E" (for noncommercial educational). For the meaning of these terms, see page (iv) of the General Instructions.

Column 4: Give the location of each station. For U.S. stations, list the community to which the station is licensed by

the FCC. For Mexican or Canadian stations, if any, give the name of the community with which the station is identified.

	<del></del>	· · · · · · · · · · · · · · · · · · ·	~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~
1. CALL SIGN	2. B'CAST CHANNEL NUMBER	3, TYPE OF STATION	4. LOCATION OF STATION
WCVE	23	E	Richmond, VA
WCVW	57	E	Richmond, VA
WRIC	8	. N	Richmond, VA
WRLH	35	1	Richmond, VA
WTVR	6	N	Richmond, VA
WUPV	65	İ	Richmond, VA
wwbt	12	N	Richmond, VA
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LEGAL NAME OF O	WHEN OF CABL	E SYSTE	₽ <b>λ</b> :				SYSTEM ID#	Name
COMCAST	OF VIRGIN	iia, in	IC.				039632	
PRIMARY TRANSMITTERS: RADIO In General: List every radio station carried on a separate and discrete basis and list those FM stations carried on an all-band basis whose signals were "generally receivable" by your cable system during the accounting period.						Н		
Special Instructions Concerning All-Band FM Carriage: Under Copyright Office Regulations, an FM signal is "generally receivable" if: (1) "it is carried by the system whenever it is received at the system's headend"; and (2) it can be expected, on the basis of monitoring, to be received at the headend, with the system's FM antenna, during certain stated intervals. For detailed information about the the Copyright Office Regulations on this point, see page (iv) of the General Instructions.  Column 1: Identify the call sign of each station carried.  Column 2: State whether the station is AM or FM.								Primary Transmittera: Radio
signal, indicat	te this by pla 4: Give the	cing a station	on's signal was electronically a check mark in the "S/D" co n's location (the community to if any, the community with w	lumn. o which the sta	ition is licens	ed by	•	
CALL SIGN	AM or FM	S/D	LOCATION OF STATION	CALL SIGN	AM or FM	S/D	LOCATION OF STATION	
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			, ,					. ]
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CCOUNTING PERIOD: 2004/2 FORM SA1-2, PAGE 5. LEBAL NAME OF OWNER OF CABLE SYSTEM: SYSTEM ID# COMCAST OF VIRGINIA, INC. 039632 In space I, identify every nonnetwork television program, broadcast by a distant station, that your cable system carried on a substitute basis during the accounting period, under specific present and former FCC rules, regulations, or authorizations. For a further explanation of the programming that must be included in this log, see page (v) of the General Substitute Instructions. Carriage: Special 1. SPECIAL STATEMENT CONCERNING SUBSTITUTE CARRIAGE: Statement and During the accounting period, did your cable system carry, on a substitute basis, any nonnetwork television program Program Log broadcast by a distant station? Note: If your answer is "No", leave the rest of this page blank. If your answer is "Yes", you must complete the program log in block 2. 2. LOG OF SUBSTITUTE PROGRAMS: In General: List each substitute program on a separate line. Use abbreviations wherever possible, if their meaning is clear. If you need more space, please attach additional pages. Column 1: Give the title of every nonnetwork television program ("substitute program") that, during the accounting period, was broadcast by a distant station and that your cable system substituted for the programming of another station under certain FCC rules, regulations, or authorizations. See page (v) of the General Instructions for further information. Do not use general categories like "movies" or "basketball." List specific program titles, for example, "I Love Lucy" or "NBA Basketball: 76ers vs. Bulls". Column 2: If the program was broadcast live, enter "Yes". Otherwise enter "No".

Column 3: Give the call sign of the station broadcasting the substitute program.

Column 4: Give the broadcast station's location (the community to which the station is licensed by the FCC or, in the case of Mexican or Canadian stations, if any, the community with which the station is identified). Column 5: Give the month and day when your system carried the substitute program. Use numerals, with the month first. Example: for May 7 give \*5/7". Column 6: State the times when the substitute program was carried by your cable system. List the times accurately to the nearest five minutes. Example: a program carried by a system from 6:01:15 p.m. to 6:28:30 p.m. should be stated as \*6:00---6:30 p.m.\* Column 7: Enter the letter "R" if the listed program was substituted for programming that your system was required to delete under FCC rules and regulations in effect during the accounting period; or enter the letter "P" if the listed program was substituted for programming that your system was permitted to delete under FCC rules and regulations in effect on October 19, 1976. WHEN SUBSTITUTE SUBSTITUTE PROGRAM CARRIAGE OCCURRED 7. REASON FOR DELETION 5, MONTH 6, TIMES t, TITLE OF PROGRAM 4. STATION'S LOCATION Yes or No

งระบาทราชาที่จะกราช กระจะ จาก จากกระ

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ORM	SA1-2.	PAGE	6.

**ACCOUNTING PERIOD: 2004/2** 

LEGAL NAME OF OWNER OF CABLE SYSTEM:  COMCAST OF VIRGINIA, INC.	SYSTEM ID# 039632	Nəmo
GROSS RECEIPTS Instructions: The figure you give in this space determines the form you file and the amount you of all amounts (*gross receipts*) paid to your cable system by subscribers for the system's *sec service* (as identified in space E) during the accounting period. For a further explanation of how to see page (v) of the General Instructions.  • Gross receipts from subscribers for secondary transmission service(s) during the accounting period.  IMPORTANT: You must complete a statement in space P concerning gross receipts.	condary transmission	K Gross Receipts
INSTRUCTIONS FOR COMPUTING THE COPYRIGHT ROYALTY FEE  To compute the royalty fee you owe:  Complete either block 1, block 2 or block 3  Use block 1 if the amount of "gross receipts" in space K is \$98,600 or less  Use block 2 if the amount of "gross receipts" in space K is more than \$98,600 but less than or equal to  Use block 3 if the amount of "gross receipts" in space K is more than \$189,800 but less than \$379,600	> \$189,800	Copyright Royalty Fee
See page (vi) of the General Instructions for more information.		
BLOCK 1: "GROSS RECEIPTS" OF \$98,600 OR LESS		
INSTRUCTIONS: As a cable system with *gross receipts* of \$98,600 or less, the royalty fee that you must pr accounting period is \$37.00  Une 1. Royalty Fee for Accounting Period		•
Line 2, Interest Charge, Enter the amount from line 4, space Q, page 8	. 0.00	
Line 3, TOTAL ROYALTY FEE PAYABLE FOR ACCOUNTING PERIOD. Add lines 1 and 2	. 37.00	:
BLOCK 2: "GROSS RECEIPTS" OF \$189,800 OR LESS (but more than \$98,600)		
Base amount under statutory formula		
2, Enter amount of "gross receipts" from space K		
3. Subtract line 2 from line 1		
4. Enter the amount of *gross receipts* from space K		
5. Enter the amount from line 3	3	!
6, Subtract line 5 from line 4		
7. Multiply line 6 by .005 (enter figure here)		
8. Interest Charge. Enter the amount from line 4, space Q, page 8		
C. Interest Orange. Differ the amount from me 4, space 4, page 6		
9. TOTAL ROYALTY FEE PAYABLE FOR ACCOUNTING PERIOD, Add lines 7 and 8		
BLOCK 3: 'GROSS RECEIPTS' OF MORE THAN \$189,800 (but less than \$379,600)	)	
1. Enter the amount of *gross receipts* from space K		
2. Base amount under statutory formula \$189,800		
3. Subtract line 2 from line 1		
4. Multiply line 3 by .01		
5. Royalty due on the first \$189,800 of gross receipts (under statutory formula)	\$949	
6. Interest Charge. Enter the amount from line 4, space Q, page 8		
7. TOTAL ROYALTY FEE PAYABLE FOR ACCOUNTING PERIOD. Add lines 4, 5, and 6		
computed in block 1, block 2, or block 3, above. Your remittance must be in the form of an electronic payment, cert check, or money order, payable to: Register of Copyrights. Other forms of remittance, including personal or or returned. Do not send cash. We recommend electronic payments.	filled check cashiers	

Name	LEGAL NAME OF OWNER OF CABLE SYSTEM:	SYSTEM ID#
	COMCAST OF VIRGINIA, INC.	039632
M Channels	CHANNELS INSTRUCTIONS: You must give: (1) the number of channels on which the cable system can stations to its subscribers; and, (2) the cable system's total number of activated channels, during	ied television broadcast g the accounting period.
	Enter the total number of channels on which the cable system carried television broadcast stations.	7
	Enter the total number of activated channels on which the cable system carried television broadcast stations and nonbroadcast services.	40
N	INDIVIDUAL TO BE CONTACTED IF FURTHER INFORMATION IS NEEDED: (Iden we can write or call about this Statement of Account.)	-
Contact	Name Comcast Cable Communications, ATTN: Jamila Baldwin Telephone 2	15-981-8527
	Address 1500 Market Street (Number, Street, Rural Rouse, Apertment of Suite Number)	
· · · · · · · · · · · · · · · · · · ·	Philadelphia, PA 19102 (City, Yown, State, ZIP Gode)	
0	CERTIFICATION: (This Statement of Account must be certified and signed in accordan Regulations, as explained in the General Instructions.)	ce with Copyright Office
Certification	i, the undersigned, hereby certify that: (Check one, but only one, of the boxes.)	
	☐(Owner other than corporation or partnership) I am the owner of the cable system as B; or	dentified in line 1 of space
	☐ (Agent of owner other than corporation or partnership) I am the duly authorized cable system as identified in line 1 of space B, and that the owner is not a corporation.	agent of the owner of the on or partnership; or
	(if a corporation) or a partner (if a partnership) of the owner of the cable system in line 1 of space B.	e legal entity identified as
	have examined the Statement of Account and hereby declare under penalty of law the contained herein are true, complete, and correct to the best of my knowledge, information, and good faith. [18 U.S.C., Section 1001(1986)]	eat all statements of fact d belief, and ere made in
	1 Charles S	S. Tyris
	Typed or printed name: DONALD S. TYRIE	
	Title:	NT & CONTROLLER
•	Date: 2/11/05	***************************************

PRIVACY ACT ADVISORY STATEMENT-Required by Privacy Act of 1974 (Public Law 93-579)

Furnishing This information is: • Voluntary

But if the Information is Not Furniched:

Il moy be necessary to celay placement of public indexes of Reguested Information in the completor record of Statement of Account.

Preparation of public indexes reports upon request in the completor record of Statement of Account.

Preparation of public indexes reports upon request in the completor record of Statement of Account.

Authority for Requesting This information:

• You may be liable for civil or criminal possible for copyright inhingement with respect to retransmission of tolovision and radio stations (17 U.S.C. §5502-808, 60 Votuntary)

• You may be liable for civil or criminal possible for copyright inhingement with respect to retransmission of tolovision and radio stations (17 U.S.C. §5502-808, 60 Votuntary)

• Examination of the Stationent of Account for compliance with legal requirement and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and responsible for copyright inhingement with respect to retransmission of tolovision and respect to retransmission of tolovis

Other Routine Uses:
Public Inspection and copying
Preparation of public Indexes
Preparation of search reports upon request

Note:

No other advisory statement will be given you in connection with this Statement of Account

Please retain a copy of this statement and roter to it if we communicate with you regarding this Statement of Account

LEGAL NAME OF OWNER OF CABLE SYSTEM:  CVCTEN IDD	
COMCAST OF VIRGINIA, INC. 039632	Name
SPECIAL STATEMENT CONCERNING GROSS RECEIPTS EXCLUSION  The Satellite Home Viewer Act of 1988 amended Title 17, section 111(d)(1)(A), of the Copyright Act by adding the following sentence:  "In determining the total number of subscribers and the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, the system shall not include subscribers and amounts collected from subscribers receiving secondary transmissions for private home viewing pursuant to	P Statement of Gross Receipts
and amounts conected from subscribers receiving secondary dansmissions for private nome viewing pursuant to section 119.*	
For more information on when to exclude these amounts, see the note on page (v) of the General Instructions.	
During the accounting period did the cable system exclude any amounts of gross receipts for secondary transmissions made by satellite carriers to satellite home "dish" owners?  NO	
NO O YES. Enter the total here	
Nome	1
Malang Accress.	1
	1
Name Name Mailing Address	
Maning Address	1
WORKSHEET FOR COMPUTING INTEREST	Q
You must complete this worksheet for those royalty payments submitted as a result of a late payment or underpayment. For an explanation of interest assessment, see page (vi) General Instructions.	interest Assessment
Line 1. Enter the amount of late payment or underpayment	
, ×	
Line 2. Multiply line 1 by the interest rate* and enter the sum here	
x days	
Line 3. Multiply line 2 by the number of days late and enter the sum here	
Line 4, Multiply line 3 by .00274** and enter here and in space L (page 6) Block 1, line 2, or Block 2, line 8, or Block 3, line 6	
(interest charge)	
*Contact the Licensing Division at 202-707-8150 for the interest rate for the accounting period in which the late payment or underpayment occurred.	
**This is the decimal equivalent of 1/365, which is the interest assessment for one day late.	
NOTE: If you are filing this worksheet covering a Statement of Account already submitted to the Copyright Office, please	[

# IF YOU ARE FILING FOR A PRIOR ACCOUNTING PERIOD, CONTACT THE LICENSING DIVISION FOR THE CORRECT FORM.

## STATEMENT OF ACCOUNT for Secondary Transmissions by Cable Systems (Short Form)

General Instructions are at the end of this form [pages (i)-(vi)].

FOR COPYRIGH	IT OFFICE USE ONLY
DATE RECEIVED	AMOUNT
FEB 2 2 2005	\$
	ALLOCATION NUMBER
	728110

SA1-2 Short Form

Return to:
LIBRARY OF CONGRESS
COPYRIGHT OFFICE
LICENSING DIVISION
101 INDEPENDENCE AVE., S.E.
WASHINGTON, DC 20557-6400
(202) 707-8150

[Deliveries to LM-458] B:S0 to 5:00

Accounting Period	ACCOUNTING PERIOD COVERED July 1 - December 31, 2004	D BY THIS STATEME	NT:					
B	INSTRUCTIONS: Your file has been established under the information given below. If there are any changes, draw a line through the incorrect information and print or type the correct information beside it. Give the full legal name of the owner of the cable system. If the owner is a subsidiary of another corporation, give the full corporate title of the subsidiary, not that of the parent corporation. List any other name or names under which the owner conducts the business of the cable system.							
	SOUTHWEST CABLEVISION, IN		YSTEM: ,	023645				
				023645 2004/2				
	P.O. BOX 802068			023043 20041Z				
	DALLAS, TX 75380							
C	INSTRUCTIONS: In line 1, give any bus names already appear in space B. In lin	liness or trade names us e 2, give the mailing add	ed to identify the business and operation ress of the system, if different from the e	of the system unless these address of the solution of the system of the space B.				
System	1 IDENTIFICATION OF CABLE ST							
	MAILING ADDRESS OF CABLE SYSTEM: P.O. BOX 4028 [Number, Street, Rural Rouse, Apartment or Suite Number) MONROE, LA. 71211-4028  (City, Town, State, ZIP Code)							
<b>D</b> Aren Servod	INSTRUCTIONS: List each separate community served by the cable system, A "community" is the same as a "community unit" as defined in FCC rules: " a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas.") 47 C.F.R. §76.5(mm). The first community that you list will serve as a form of system identification hereafter known as the "First Community." Please use it as the First Community on all future fillings.  Note: Entities and properties such as hotels, apartments, condominants or mobile home parks should be reported in parentheses below the identified city.							
<b></b>	CITY OR TOWN	STATE	CITY OR TOWN	STATE				
First > Community	WISNER GILBERT	LA						
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FORM SA1-2. PAGE 2. ACCOUNTING					TING PERIOD: 2004/						
LEGAL NAME OF OWNER OF CABLE SYSTEM:									SYST	EM ID#	Name
SOUTHWEST CABLEVISION, INC.								023645			
SECONDARY TRANSMISSION SERVICE: SUBSCRIBERS AND RATES  In General: The information in space E should cover all categories of "secondary transmission service" of the cable system: that is, the retransmission of television and radio broadcasts by your system to subscribers. Give information about other services (including pay cable) in space F, not here. All the facts you state must be those existing on the last day of the accounting period (June 30 or December 31, as the case may be).  Number of Subscribers: Both blocks in space E call for the number of subscribers to the cable system, broken down by categories of secondary transmission service. In general, you can compute the number of "subscribers" in each									Secondary transmission Service: Subscribers and Rates		
ВЬОСК							LOCK 2	•			
CATEGORY OF SERVICE	NC	O. OF CRIBERS	RATE	CATEGO	RY OF SE	EF	RVICE		OF CRIBERS	RATE	
Residential:  Service to First Set Service to Additional Set(s) FM Radio (if separate rate). Motel, Hotel	SECON for rate (							F			
furnished at cost; and (2) services or facilities furnished to nonsubscribers. Rate information should include both the amount of the charge and the unit in which it is usually billed. If any rates are charged on a variable per-program basis, enter only the letters"PP* in the rate column.									Services Other Than Secondary Transmissions: Rates		
	BLOC	K 1						BLOCK	2		
CATEGORY OF SERVICE	RATE	CATEGO	RY OF SE	RVICE	RATE		CATEGO	RY OF S	ERVICE	RATE	
Continuing Services:  Pay Cable  Pay Cable  Fire Protection  Burglar Protection  Installation: Residential  First Set  Additional Set(s).  FM Radio (if separate rate)  Converter.	12.50 7.00 N/A N/A 35.00 N/A N/A	• Motel, • Comm • Pay Ca • Pay Ca • Fire Pr • Burglan Other Ser • Recons • Discon	Hotel ercial able ble Add' otection r Protection rvices:	T Channel,	35.00 35.00 35.00						
			New Add		35.00	ļ.		• • • • • • • • • • • • • • • • • • •			•

FORM SA1-2, PAGE 3. **ACCOUNTING PERIOD: 2004/2** SYSTEM ID# LEGAL NAME OF OWNER OF CARLE SYSTEM 023645 SOUTHWEST CABLEVISION, INC. **INSTRUCTIONS:** General: In space G, identify every television station (including translator stations and low power television stations) G carried by your cable system during the accounting period, except: (1) stations carried only on a part-time basis under Carried by your cable system during the accounting period, except. (1) standard only on a partial standard on the CC rules and regulations in affect on June 24, 1981 permitting the carriage of certain network programs [sections 76.59(d/2) and (4), 76.61(e)(2) and (4) or 76.63 (referring to 76.61(e)(2) and (4))]; and (2) certain stations carried on a substitute program basis, as explained in the next paragraph.

Substitute Basis Stations: With respect to any distant stations carried by your cable system on a substitute program Primary Transmitters: Television basis under specific FCC rules, regulations, or authorizations: . Do not list the station here in space G-but do list it in space I (the Special Statement Program Log)—if the station was carried only on a substitute basis. List the station here, and also in space I, if the station was carried both on a substitute basis and also on some other basis. For futher information concerning substitute basis stations, see page (v) of the General Instructions. Column 1: List each station's call sign. Do not report program services such as 1800 : SEW and Column 2: Give the number of the channel on which the station's broadcasts are carried in its own community. This may be different from the channel on which your cable system carried the station. Column 3: Indicate in each case whether the station is a network station, an independent station, or a noncommercial educational station, by entering the letter "N" (for network), "I" (for network), "I" (for network) or "E" (for noncommercial educational). For the meaning of these terms, see page (iv) of the General Instructions.

Column 4: Give the location of each station. For U.S. stations, list the community to which the station is licensed by the FCC. For Mexican or Canadian stations, if any, give the name of the community with which the station is identified. 1. CALL 2. B'CAST 3, TYPE 4. LOCATION OF STATION CHANNEL OF SIGN STATION NUMBER KAQY N 11 COLUMBIA, LA KARD N 14 W. MONROE, LA KLTM E 13 MONROE, LA KNOE N 8 MONROE, LA KTVE N 10 MONROE, LA

	OWNER OF CABL						SYSTEM ID#	Name
OU I HWE	ST CABLE	AISIO	IN, INC.				023645	
In Gener	RANSMIT	v radio	S: RADIO o station carried on a separate ere "generally receivable" by	and discrete t	oasis and lis	t thos	e FM stations carried on an	Н
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enerally received, and interval eneral instruction Column Column Column Column Column Column Column Column Column	eeivable" if: ( , on the basius. For detainctions.  1: Identify the cadius of the radius of the radius of the radius of the sortes of the sort	(1) "it is is of m iled inf he call ether t io station acing a station	ncerning All-Band FM Carri is carried by the system when nonitoring, to be received at the formation about the the Copy I sign of each station carried, the station is AM or FM, ion's signal was electronically a check mark in the "S/D" col- n's location (the community to if any, the community with wh	never it is receite he headend, warright Office Reprocessed by umn.	ived at the s with the syste egulations o the cable sy tion is licens	ysten em's l on this vstem	a's headend*; and (2) it can M antenna, during certain point, see page (iv) of the as a separate and discrete	Primery Trensmittere: Radio
CALL SIGN	AM or FM	S/D	LOCATION OF STATION	CALL SIGN	AM or FM	S/D	LOCATION OF STATION	
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Name

LEGAL NAME OF OWNER OF CABLE SYSTEM

SOUTHWEST CABLEVISION, INC.

SYSTEM ID# 023645

I

Substitute Carriage: Special Statement and Program Log

#### GENERAL:

In space I, identify every nonnetwork television program, broadcast by a distant station, that your cable system carried on a substitute basis during the accounting period, under specific present and former FCC rules, regulations, or authorizations. For a further explanation of the programming that must be included in this log, see page (v) of the General Instructions.

#### 1. SPECIAL STATEMENT CONCERNING SUBSTITUTE CARRIAGE:

During the accounting period, did your cable system carry, on a substitute basis, any nonnetwork television program broadcast by a distant station?
 Yes
 Note: If your answer is "No", leave the rest of this page blank. If your answer is "Yes", you must complete the program log in block 2.

#### 2, LOG OF SUBSTITUTE PROGRAMS:

In General: List each substitute program on a separate line. Use abbreviations wherever possible, if their meaning is clear. If you need more space, please attach additional pages,

Column 1: Give the title of every nonnetwork television program ("substitute program") that, during the accounting period, was broadcast by a distant station and that your cable system substituted for the programming of another station under certain FCC rules, regulations, or authorizations. See page (v) of the General Instructions for further information. Do not use general categories like "movies" or "basketball." List specific program titles, for example, "I Love Lucy" or "NBA Basketball; 76ers vs. Bulls".

Column 2: If the program was broadcast live, enter "Yes". Otherwise enter "No".

Column 3: Give the call sign of the station broadcasting the substitute program.

Column 4: Give the broadcast station's location (the community to which the station is licensed by the FCC or, in the case of Mexican or Canadian stations, if any, the community with which the station is identified).

Column 5: Give the month and day when your system carried the substitute program. Use numerals, with the month first. Example; for May 7 give \*5/7\*.

Column 6: State the times when the substitute program was carried by your cable system. List the times accurately to the nearest five minutes. Example: a program carried by a system from 6:01:15 p.m. to 6:28:30 p.m. should be stated as \*6:00—6:30 p.m.\*

Column 7: Enter the letter "R" if the listed program was substituted for programming that your system was required to delete under FCC rules and regulations in effect during the accounting period; or enter the letter "P" if the listed program was substituted for programming that your system was permitted to delete under FCC rules and regulations in effect on October 19, 1976.

SUB	WHEN CARRIA	SUBSTITUTE GE OCCURRED	7. REASON FOR			
1. TITLE OF PROGRAM	2, LIVE? Yes or No	3. STATION'S CALL SIGN	4. STATION'S LOCATION	5, MONTH AND DAY	6. TIMES FROM — TO	DELETION
						••••••
	<u> </u>					,
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***************************************						••••••
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<u> </u>	1		!1	T		

LEGAL NAME OF OWNER OF CABLE SYSTEM:  SYSTEM 1	
SOUTHWEST CABLEVISION, INC. 0236	45
GROSS RECEIPTS. Instructions: The figure you give in this space determines the form you file and the amount you pay. Enter the to of all amounts ("gross receipts") paid to your cable system by subscribers for the system's "secondary transmission."	tal K
service" (as identified in space E) during the accounting period. For a further explanation of how to compute this amou see page (v) of the General Instructions.	nt, Gross Ro
Gross receipts from subscribers for secondary transmission service(s) during the accounting period.  IMPORTANT: You must complete a statement in space P concerning gross receipts.  (Amount of "gross receipts.")	· - 1 1
INSTRUCTIONS FOR COMPUTING THE COPYRIGHT ROYALTY FEE	L
To compute the royalty fee you owe:  • Complete either block 1, block 2 or block 3  • Use block 1 if the amount of "gross receipts" in space K is \$98,500 or less  • Use block 2 if the amount of "gross receipts" in space K is more than \$98,500 but less than or equal to \$189,800  • Use block 3 if the amount of "gross receipts" in space K is more than \$189,800 but less than \$379,600	Copyri Royalty
See page (vi) of the General Instructions for more Information.	
BLOCK 1: "GROSS RECEIPTS" OF \$98,600 OR LESS INSTRUCTIONS: As a cable system with "gross receipts" of \$98,600 or less, the royally fee that you must pay for this six-month	
accounting period is \$37.00  Line 1. Royalty Fee for Accounting Period	
Line 2. Interest Charge. Enter the amount from line 4, space Q, page 8	0
Line 3. TOTAL ROYALTY FEE PAYABLE FOR ACCOUNTING PERIOD. Add lines 1 and 2	0
BLOCK 2: "GROSS RECEIPTS" OF \$189,800 OR LESS (but more than \$98,600)	
1. Base amount under statutory formula	
2. Enter amount of "gross receipts" from space K	
3. Subtract line 2 from line 1	
4, Enter the amount of "gross receipts" from space K	
5. Enter the amount from line 3	1
6. Subtract line 5 from line 4	į
7. Multiply line 6 by .005 (enter figure here)	_
8, Interest Charge. Enter the amount from line 4, space Q, page 8	
B. TOTAL ROYALTY FEE PAYABLE FOR ACCOUNTING PERIOD, Add lines 7 and 8	
BLOCK 3: "GROSS RECEIPTS" OF MORE THAN \$189,800 (but less than \$379,600)	$\exists$
1, Enter the amount of "gross receipts" from space K	
2, Base amount under statutory formula \$189,800	
3. Subtract line 2 from line 1	
4, Multiply line 3 by .01	
5. Royalty due on the first \$189,800 of gross receipts (under statutory formula) \$949	
6. Interest Charge. Enter the amount from line 4, space Q, page 8	
	7]
	.]]

Name	LEGAL NAME OF OWNER OF CABLE SYSTEM:	SYSTEM ID#			
	SOUTHWEST CABLEVISION, INC.	023645			
Channels	CHANNELS INSTRUCTIONS: You must give: (1) the number of channels on which the cable system can stations to its subscribers; and, (2) the cable system's total number of activated channels, during				
	Enter the total number of channels on which the cable system carried television broadcast stations.	5			
	Enter the total number of activated     channels on which the cable system carried television broadcast stations     and nonbroadcast services.	31			
N	INDIVIDUAL TO BE CONTACTED IF FURTHER INFORMATION IS NEEDED: (Iden we can write or call about this Statement of Account.)	tify an individual to whom			
Contact	Name DOUGLAS K BRIDGES Telephone 9	72-233-9616			
· !	Address P.O. BOX 802068 [Number, Street, Rural Route, Apartment or Suita Number]	,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,			
	DALLAS, TX 75380				
	(City, Yown, State, ZIP Godq)				
0	CERTIFICATION: (This Statement of Account must be certified and signed in accordance Regulations, as explained in the General Instructions.)	ce with Copyright Office			
Certification	• I, the undersigned, hereby certify that: (Check one, but only one, of the boxes.)	•			
	☐ (Owner other than corporation or partnership) I am the owner of the cable system as it B; or	dentified in line 1 of space			
	☐ (Agent of owner other than corporation or partnership) I am the duly authorized agent of the owner of the cable system as identified in line 1 of space B, and that the owner is not a corporation or partnership; or				
	☐ (Officer or partner) I am an officer (if a corporation) or a partner (if a partnership) of the legal entity identified as owner of the cable system in line 1 of space B.				
	<ul> <li>I have examined the Statement of Account and hereby declare under penalty of law the contained herein are true, complete, and correct to the best of my knowledge, information, and good faith. [18 U.S.C., Section 1001(1986)]</li> </ul>	at all statements of fact belief, and are made in			
	Handwritten signature: (X) Dans G. K.A.	5			
	Typed or printed name: DOUGLAS K BRIDGES				
		PRESIDENT			
	Title:	ership}			
	Date:				

PRIVACY ACT ADVISORY STATEMENT-Required by Privacy Act of 1974 (Pubic Law \$3-579)

Furnishing This information is:

O Vokutary

But if the Information is Not Furnished:

• It may be necessary to delay placement of
this Statement of Account in the completed record of Statements of Account.

Authority for Requesting This information:

O Tike 17, U.S.C. §11:

Furnishing This information is:

O Volume to Explore the County of the Cou 509-510)

Principal Uses of Requested Information:

• Establishment and manienance of a public record.

Examination of the Statement of Account for compliance with legal requirement

Other Routine Uses:

Public inspection and copying

Preparation of public indexes

Preparation of search reports upon request

Note:

No other advisory statement will be given you in connection with this Statement of Account

Please rotain a copy of this statement and roker to it if we communicate with you regarding this Statement of Account

FUHM DA 172. FAGE B.		<del></del>				
LEGAL NAME OF OWNER OF CABLE SYSTEM	SYSTEM ID#	Name				
SOUTHWEST CABLEVISION, INC.	. 023645					
SPECIAL STATEMENT CONCERNING GROSS RECEIPTS EXCLUSION  The Satellite Home Viewer Act of 1988 amended Title 17, section 111(d)(1)(A), of the Copyright Act by adding the following sentence:  "In determining the total number of subscribers and the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, the system shall not include subscribers and amounts collected from subscribers receiving secondary transmissions for private home viewing pursuant to section 119."						
For more information on when to exclude these amounts, se	ee the note on page (v) of the General Instructions.					
During the accounting period did the cable system exclude a made by satellite carriers to satellite home "dish" owners?	any amounts of gross receipts for secondary transmissions					
NO VES. Enter the total here and list the satellite carrier(s) below.	s					
Name Mailing Address						
Nome Malfing Address	Name					
,						
WORKSHEET FOR COMPUTING INTEREST						
		Q				
You must complete this worksheet for those royalty payments submitted as a result of a late payment or underpayment. For an explanation of interest assessment, see page (vi) General Instructions.						
Line 1. Enter the amount of late payment or underpayment						
	x%					
Line 2. Multiply line 1 by the interest rate* and enter the sum	here					
	x days					
Line 3. Multiply line 2 by the number of days late and enter t						
,	x .00274					
Line 4, Multiply line 3 by .00274** and enter here and in space L (page 6) Block 1.						
line 2, or Block 2, line 8, or Block 3, line 6						
	(interest charge)					
*Contact the Licensing Division at 202-707-8150 for the interest rate for the accounting period in which the late payment						
or underpayment occurred.						
**This is the decimal equivalent of 1/365, which is the interest assessment for one day late.						
NOTE: If you are filing this worksheet covering a Statement of Account already submitted to the Copyright Office, please list below the Owner, Address, First Community Served, and Accounting Period as given in the original filing.						
Owner						
Address						
First Community Served						
Accounting Period						

AGREEMENT						
This Agreement is made and entered into this day of 2005, by and between Joint Sports Claumants. Program Suppliers; Broadcaster Claimants Group; the American Society of Composers, Authors and Publishers. Broadcast Music. Inc., and SESAC, Inc. (hereinafter "Music Claimants"); Public Television Claimants: and Devotional Claimants. (hereinafter 'Phase I Parties") and the Library of Congress, Copyright Office, Washington, D.C. (hereinafter "Copyright Office").						
WHEREAS, under the provisions of 17 U.S.C. 801(b)(3)(a), the Copyright Royalty Board (herematics "Board") has discretion to distribute funds not in controversy, and						
WHEREAS, representatives of Phase I Parties identified above, have petitioned the Board for a distribution of 50% of the 2001, 2002, and 2003 satellite royalty fees currently on deposit with the U.S. Treasury, invested in interest-hearing funds for later distribution by the Board; and						
WHEREAS, the Board has ordered a partial distribution of 50% of the 2001, 2002, and 2003 satellite royalty fees currently being held. PROVIDED THAT each of the Phase I Parties sign an agreement prepared by the Copyright Office stating that any overpayment that results from the distribution of the 2001, 2002, and 2003 satellite royalty fees shall be repaid to the Copyright Office with interest according to the amount that would have accrued if the principal had remained in the fund.						
NOW THEREFORE, in consideration of the above, the Phase I Parties agree as follows:						
(1) On or after October 6, 2005, the Copyright Office will distribute 50% of the 2001, 2002, and 2003 satellite royalty runds to the Phase I Parties pursuant to the September 13, 2005, Order of the Board. Docket No. 2005-2 CRB SD 2001-2003.						
(2) In the event that the cost of any Phase I or Phase II distribution proceeding for the determination of the distribution of the 2001, 2002, and 2003 satellite royalty fees, including any award to a Phase I or Phase II claimant made by competent authority, exceeds the amount of the 2001, 2002, and 2003 satellite royalty fees withheld in accordance with the Board's Order, the Phase I Parties agree to remit, and agree to and will bind, if necessary, any successor(s) in interest or distributee(s) to remit, to the Copyright Office within thirty (30) days of the date upon notification from the Copyright Office that insufficient funds exist to make a determined award to a Phase I or Phase II claimant, the amount to be specified by the Copyright Office, but not to exceed the amount specified in paragraph (1).						
(3) The undersigned hereby certifies that he/she is the duly authorized representative or agent for one or more Phase I Parties, and has the express authority to enter this agreement on the party's or parties' behalf. Penalties for fraud and false statements are available under 18 U.S.C. §1001 et.seq.						
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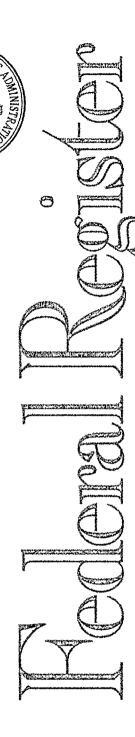
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ed Agreement must be returned to	the below address b	y September 29, 2005.	
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	Washington, £	O.C. 20557-6400	
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Monday, July 8, 2002

## Part III

# Library of Congress

Copyright Office

37 CFR Part 261

Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule

## LIBRARY OF CONGRESS Copyright Office

37 CFR Part 261

[Docket No. 2000-9 CARP DTRA 1&2]

**Determination of Reasonable Rates** and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Librarian of Congress, upon recommendation of the Register of Copyrights, is announcing the determination of the reasonable rates and terms for two compulsory licenses, permitting certain digital performances of sound recordings and the making of ephemeral recordings.

EFFECTIVE DATE: July 8, 2002.

ADDRESSES: The full text of the public version of the Copyright Arbitration Royalty Panel's report to the Librarian of Congress is available for inspection and copying during normal working hours in the Office of the General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, SE., Washington, DC 20540. The report is also posted on the Copyright Office website at http:// www.copyright.gov/carp/ webcasting rates.html.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya Sandros, Senior Attorney, Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380. Telefax: (202) 707-8366.

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### I. Background

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act ("DPRA"), Public Law 104-39, which created an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform publicly their sound recordings by means of certain digital audio transmissions. Among the limitations on the performance right was the creation of a new compulsory license for nonexempt, noninteractive, digital

subscription transmissions. 17 U.S.C.

The scope of this license was expanded in 1998 upon passage of the Digital Millennium Copyright Act of 1998 ("DMCA" or "Act"), Public Law 105-304, in order to allow a nonexempt eligible nonsubscription transmission (the "webcasting license") and a nonexempt transmission by a preexisting satellite digital audio radio service to perform publicly a sound recording in accordance with the terms and rates of the statutory license. 17 U.S.C. 114(a). In addition to expanding the section 114 license, the DMCA also created a new statutory license for the making of an "ephemeral recording" of a sound recording by certain transmitting organizations (the "ephemeral recording license"). 17 U.S.C. 112(e). The new statutory license allows entities that transmit performances of sound recordings to business establishments, pursuant to the limitations set forth in section 114(d)(1)(C)(iv), to make an ephemeral recording of a sound recording for purposes of a later transmission. The new license also provides a means by which a transmitting entity with a statutory license under section 114(f) can make more than the one phonorecord permitted under the exemption set forth in section 112(a). 7 U.S.C. 112(e).

The statutory scheme for establishing reasonable terms and rates is the same for both of the new licenses. The terms and rates for the two new statutory licenses may be determined by voluntary agreement among the affected parties, or if necessary, through compulsory arbitration conducted pursuant to Chapter 8 of the Copyright

In this case, interested parties were unable to negotiate an industry-wide agreement. Therefore, a Copyright Arbitration Royalty Panel ("CARP") was convened to consider proposals from interested parties and, based upon the written record created during this process, to recommend rates and terms for both the webcasting license and the ephemeral recording license.

<sup>&</sup>lt;sup>1</sup> An "eligible nonsubscription transmission" is a noninteractive, digital audio transmission which, as the name implies, does not require a subscription for receiving the transmission. The transmission must also be made a part of a service that provides audio programming consisting in a whole or in part of performances of sound recordings; the purpose of which is to provide audio or entertainment programming, but not to sell, advertise, or promote particular goods or services.

#### II. The CARP Proceeding to Set Reasonable Rates and Terms

These proceedings began on November 27, 1998, when the Copyright Office announced a six-month voluntary negotiation period to set rates and terms for the webcasting license and the ephemeral recording license for the first license period covering October 28, 1998-December 31, 2000, 63 FR 6555 (November 27, 1998). During this period, the parties negotiated a number of private agreements in the marketplace, but no industry-wide agreement was reached. Consequently, in accordance with the procedural requirements, the Recording Industry Association of America, Inc. ("RIAA") petitioned the Copyright Office on July 23, 1999, to commence a CARP proceeding to set the rates and terms for these licenses. The Office responded by setting a schedule for the CARP proceeding. See 64 FR 52107 (Sept. 27, 1999).

However, the schedule proved unworkable for the parties. RIAA filed a motion with the Copyright Office on November 23, 1999, requesting a postponement of the date for filing direct cases. It argued that the Office should provide more time for the parties to prepare their cases in light of the complexity of the issues and the record number of new participants. The Office granted this request and held a meeting to clarify the procedural aspects of the proceeding, especially for the new participants, and to discuss a new schedule for the arbitration phase of the process. Order in Docket No. 99-6 CARP DTRA (dated December 22, 1999). In the meantime, the Office commenced the six-month negotiation period for the second license period, covering January 1, 2001-December 31, 2002. 66 FR 2194 (January 13, 2000). Ultimately, the Copyright Office consolidated these two proceedings into a single proceeding in which one CARP would set rates and terms for the two license periods for both the webcasting license and the ephemeral recording license. See Order in Docket Nos. 99-6 CARP DTRA and 2000-3 CARP DTRA 2 (December 4, 2000). The 180-day period for the consolidated proceeding began on July 30, 2001, and on February 20, 2002, the panel submitted its report (the "CARP Report" or "Report"), in which it proposed rates and terms to the Copyright Office. It is the decision of this Panel that is the basis for the Librarian's decision today.2

#### A. The Parties

The parties 3 to this proceeding are: (i) The Webcasters,4 namely, BET.com, Comedy Central, Echo Networks, Inc., Listen.com, Live365.com, MTVi Group, LLC, Myplay, Inc., NetRadio Corporation, Radio Active Media Partners, Inc.: RadioWave.com, Inc., Spinner Networks Inc. and XACT Radio Network LLC; (ii) the FCC-licensed radio Broadcasters,5 namely, Susquehanna Radio Corporation, Clear Channel Communications Inc., Entercom Communications Corporation, Infinity Broadcasting Corporation, and National Religious Broadcasters Music License Committee (collectively "the Broadcasters"); (iii) the Business Establishment Services, 6 namely, DMX/ AEI Music Inc. (also referred to as "Background Music Services"); (iv) American Federation of Television and Radio Artists ("AFTRA");7 (v) American Federation of Musicians of the United States and Canada

instance, the Panel submitted its report approximately three weeks later than anticipated under this provision due to a suspension of the proceedings during the period November 9, 2001, through December 2, 2001. The Copyright Office granted the suspension at the parties' request in order to allow them to engage in further settlement discussions. At the same time, the Office granted the Panel an additional period of time, commensurate with the suspension period, for hearing evidence and preparing its report. See Order, Docket No. 2000–9 CARP DTRA 1&2 (November 9, 2001). Additional details concerning the earlier procedural aspects of this proceeding are set forth in the CARP Report at pp. 10–18.

<sup>3</sup> At the outset of the proceeding, Webcaster parties also included Coollink Broadcast Network, Everstream, Inc., Incanta, Inc., Launch Media, Inc., MusicMatch, Inc., Univision Online, and Westwind Media.com, Inc., which have since withdrawn or been dismissed from the proceeding. Late in the proceeding, National Public Radio ("NPR") reached a private settlement with RIAA and withdrew prior to the conclusion of the 180-day hearing period. Because RIAA, AFTRA, AFM, and AFIM propose the same rates and take similar positions on most issues, they are sometimes referred to collectively as "RIAA" or "Copyright Owners and Performers" for convenience. Similarly, Webcasters, Broadcasters, and the Business Establishment Services are sometimes referred to collectively as "the Services."

<sup>4</sup>The Webcasters are *Internet* services that each employ a technology known as "streaming," but comprise a range of different business models and music programming.

<sup>5</sup> The Broadcasters are commercial AM or FM radio stations that are licensed by the Federal Communications Commission ("FCC").

<sup>6</sup> The Business Establishment Services, DMX/AEI Music, deliver sound recordings to business establishments for the enjoyment of the establishments' customers. See Knittel W.D.T. 4. DMX/AEI Music is the successor company resulting from a merger between AEI Music Network, Inc. ("AEI") and DMX Music, Inc. ("DMX").

<sup>7</sup> AFTRA, the American Federation of Television and Radio Artists, is a national labor organization representing performers and newspersons. See Tr. 2830 (Himelfarb). ("AFM");8 (vi) Association For Independent Music ("AFIM");9 and (vii) Recording Industry Association of America, Inc. ("RIAA"),10 Music Choice, a Business Establishment Service, was initially a party to this proceeding, but on March 26, 2001, it filed a motion to withdraw from the proceeding. Its motion was unopposed and, on May 9, 2001, its motion to withdraw was granted.

B. The Position of the Parties at the Commencement of the Proceeding

#### 1. Rates Proposed by Copyright Owners

RIAA proposed rates derived from an analysis of 26 voluntarily negotiated agreements between itself and individual webcasters. RIAA claims that these agreements "involve the same buyer, the same seller, the same right, the same copyrighted works, the same time period and the same medium as those in the marketplace that the CARP must replicate." CARP Report at 26, citing RIAA PFFCL <sup>11</sup> (Introduction at 8). Based upon these agreements, RIAA proposed the following rates for DMCA compliant webcasting services:

(i) For basic "business to consumer" (B2C) webcasting services:

0.4c for each transmission of a sound recording to a single listener, or 15% of the service's gross revenues.

(ii) For "business to business" (B2B) webcasting services, where transmissions are made as part of a service that is syndicated to third-party websites:

0.5c for each transmission of a sound recording to a single listener

(iii) For "listener-influenced" webcasting services:

0.6c for each transmission of a sound recording to a single listener

(iv) Minimum fee (subject to certain qualifications): \$5,000 per webcasting service

<sup>&</sup>lt;sup>2</sup> Section 802 (e) of the Copyright Act requires the CARP to report its determination concerning the royalty fee to the Librarian of Congress 180 days after the initiation of a proceeding. In this particular

<sup>&</sup>lt;sup>8</sup> AFM, the American Federation of Musicians, is a labor organization representing professional musicians. See Bradley W.D.T. 1.

<sup>&</sup>lt;sup>9</sup> AFIM, the Association For Independent Music, is a trade association representing independent record companies, wholesalers, distributors and retailers. See Tr. 2830 (Himelfarb)

<sup>&</sup>lt;sup>10</sup> RIAA is a trade association representing record companies, including the five "majors" and numerous "independent" labels.

<sup>11</sup> Hereinafter, references to proposed findings of fact and conclusions of law shall be cited as "OFFCK" preceded by the name of the party that submitted the filing followed by the paragraph number. References to written direct testimony shall be cited as "W.D.T." preceded by the last name of the witness and followed by a page number. References 9to written rebuttal testimony shall be cited as "W.R.T." preceded by the last name of the witness and followed by a page number. References to the transcript shall be cited as "TR." followed by the page number and the last name of the witness.

(v) Ephemeral license fee:

10% of each service's performance royalty fee payable under (i), (ii), or (iii).

For the section 112 license applicable to the business establishment services, the copyright owners proposed a rate set at 10% of gross revenues with a minimum fee of \$50,000 a year.

#### 2. Rates Proposed by Services

Webcasters proposed per-performance and per-hour sound recording performance fees, based upon an economic model, that considered the aggregate fees paid to the three performance rights organizations (ASCAP, BMI, and SESAC) that license the public performances of musical works for radio programs that are broadcast over-the-air by FCC-licensed broadcasters, by 872 radio stations during 2000. From this model, the webcasters derived a per-song and a perlistener hour base rate of 0.02¢ per song and 0.3¢ per hour, respectively. These figures were then adjusted to account for a number of factors, including the promotional value gained by the record companies from the performance of their works. This adjustment resulted in a fee proposal of 0.014¢ per performance or 0.21¢ per hour.

At the end of the proceeding, Webcasters suggested in their proposed findings of fact and conclusions of law an alternative method for calculating royalty fees, namely, a percentage-of-revenue fee structure. Specifically, Webcasters proposed a fee of 3% of a webcaster's gross revenues for all services. The alternative proposal was made with the understanding that the service would be able to elect either option.

Webcasters proposed no additional fee for the making of ephemeral recordings and a minimum fee of \$250 per annum for each service operating under the section 114 license.

The Business Establishment Services who need only an ephemeral recording license proposed a flat rate of \$10,000 per year for each company.

#### C. The Panel's Determination of Reasonable Rates and a Minimum Fees

In this proceeding, the Panel had to establish rates and terms of payment for digital transmissions of sound recordings made by noninteractive, nonsubscription services and rates for the making of ephemeral phonorecords made pursuant to the section 112(e) license; either to facilitate those transmissions made or by business establishments which are otherwise exempt from the digital performance right.

The proposed rates are set forth in Appendix A of the CARP Report, which is posted on the Copyright Office website at: http://www.copyright.gov/carp/webcasting\_rates\_a.pdf.

The proposed terms of payment may be found in Appendix B of the CARP Report, which is posted on the Copyright Office website at: http://www.copyright.gov/carp/webcasting\_rates\_b.pdf.

# III. The Librarian's Scope of Review of the Panel's Report

The Copyright Royalty Tribunal Reform Act of 1993 (the Reform Act), Pub. L. No. 103-198, 107 Stat. 2304, created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable. but the Reform Act created two layers of review that result in final orders: one by the Librarian of Congress (Librarian) and a second by the United States Court of Appeals for the District of Columbia Circuit. Section 802(f) of title 17 directs the Librarian on the recommendation of the Register of Copyrights either to accept the decision of the CARP, or to reject it. If the Librarian rejects it, he must substitute his own determination "after full examination of the record created in the arbitration proceeding." 17 U.S.C. 802(f), If the Librarian accepts it, then the determination of the CARP becomes the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that will be subject to review by the Court of Appeals. 17 U.S.C. 802(g).

The review process has been thoroughly discussed in prior recommendations of the Register of Copyrights (Register) concerning rate adjustments and royalty distribution proceedings. See, e.g., Distribution of 1990, 1991, and 1992 Cable Royalties, 61 FR 55653 (1996); Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55742 (October 28, 1997). Nevertheless, the discussion merits repetition because of its importance in reviewing each CARP decision.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP, "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." Neither the Reform Act nor its legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is any different from the "arbitrary" standard described in the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A).

Review of the case law applying the APA "arbitrary" standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency action is generally considered to be arbitrary when:

 It relies on factors that Congress did not intend it to consider;

2. It fails to consider entirely an important aspect of the problem that it was solving;

3. It offers an explanation for its decision that runs counter to the evidence presented before it;

4. It issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;

5. It fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and

6. Its action entails the unexplained discrimination or disparate treatment of similarly situated parties.

Motor Vehicle Mfrs. Ass'n. State Farm Mutual Auto. Insurance Co., 463 U.S. 29 (1983); Celcom Communications Corp. v. FCC, 789 F.2d 67 (D.C. Cir. 1986); Airmark Corp. v. FAA, 758 F.2d 685 (D.C. Cir. 1985).

In reviewing the CARP's decision, the Librarian has been guided by these principles and the prior decisions of the District of Columbia Circuit in which the court applied the "arbitrary and capricious" standard of 5 U.S.C. 706(2)(A) to the determinations of the former Copyright Royalty Tribunal (hereinafter "CRT or Tribunal"). See, e.g, National Cable Tele. Ass'n v. CRT 724 F.2d 176 (D.C. Cir. 1983) (applying the Administrative Procedure Act's standard authorizing courts to set aside agency action found to be arbitrary, capricious, and abuse of discretion, or otherwise in accordance with law."); see also, Recording Industry Ass'n of America v. CRT, 662 F.2d 1, 7-9 (D.C. Cir. 1981); Amusement and Music Operators Ass'n v. CRT, 676 F.2d 1144, 1149-52 (7th Cir.), cert denied, 459 U.S. 907 (1982); National Ass'n of Broadcasters v. CRT, 675 F.2d 367, 375 n. 8 (D.C. Cir. 1982)

Review of judicial decisions regarding Tribunal actions reveals a consistent theme; while the Tribunal was granted a relatively wide "zone of reasonableness," it was required to articulate clearly the rationale for its award of royalties to each claimant. See National Ass'n of Broadcasters v. CRT, 772 F.2d 922 (D.C. Cir. 1985), cert. denied, 475 U.S. 1035 (1986) (NAB v. CRT); Christian Broadcasting Network v.

CRT, 720 F.2d 1295 (D.C. Cir. 1983) (Christian Broadcasting v. CRT); National Cable Television Ass'n v. CRT, 689 F.2d 1077 (D.C. Cir. 1982) (NCTA v. CRT); Recording Indus. Ass'n of America v. CRT, 662 F.2d 1 (D.C. Cir. 1981) (RIAA v. CRT). As the D.C. Circuit succinctly noted:

We wish to emphasize \* \* \* that precisely because of the technical and discretionary nature of the Tribunal's work, we must especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully. \* \* \*

Christian Broadcasting v. CRT, 720 F.2d at 1319 (D.C. Cir. 1983), quoting NCTA v. CRT, 689 F.2d at 1091 (D.C. Cir. 1982).

Because the Librarian is reviewing the CARP decision under the same 'arbitrary'' standard used by the courts to review the Tribunal, he must be presented by the CARP with a rational analysis of its decision, setting forth specific findings of fact and conclusions of law. This requirement of every CARP report is confirmed by the legislative history of the Reform Act which notes that a "clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress." H.R. Rep. No. 103–286, at 13 (1993). This goal cannot be reached by "attempt[ing] to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record." Christian Broadcasting v. CRT, 720 F.2d at 1319.

It is the task of the Register to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination. 17 U.S.C. 802(f).

#### IV. The CARP Report: Review and Recommendation of the Register of Copyrights

The law gives the Register the responsibility to review the CARP report and make recommendations to the Librarian whether to adopt or reject the Panel's determination. In doing so, she reviews the Panel's report, the parties' post-panel submissions, and the record evidence.

After carefully considering the Panel's report and the record in this proceeding, the Register has concluded that the rates proposed by the Panel for use of the webcasting license do not reflect the rates that a willing buyer and willing seller would agree upon in the marketplace. Therefore, the Register has made a recommendation that the

Librarian reject the proposed rates (\$0.14 per performance for Internet-only transmissions and \$0.07 per performance for radio retransmissions) for the section 114 license and substitute his own determination (0.07c per performance for both types of transmissions), based upon the Panel's analysis of the hypothetical marketplace, and its reliance upon contractual agreements negotiated in the marketplace.

These changes necessitate an adjustment to the proposed rates for non-CPB, noncommercial broadcasters 12 for Internet-only transmissions as well. The adjusted rate for archived programming subsequently transmitted over the Internet, substituted programming and up to two side channels is 0.02¢, reflecting a downward adjustment from the 0.05¢ rate proposed by the Panel. The new rate for all other transmissions made by non-CPB, noncommercial broadcasters is 0.07¢ per performance per listener. Using this methodology, the Register recommends that the Librarian also reject the Panel's determination of a rate for the making of ephemeral recordings by those Licensees operating under the webcasting license. Because the Panel had made an earlier determination not to consider 25 of the 26 contracts submitted by RIAA for the purpose of setting a rate for the webcasting license, it was arbitrary for the Panel to use these same rejected licenses to set the Ephemeral License Fee. See section IV.13 herein for discussion. Consequently, the Register proposes a downward adjustment-from 9% of the performance royalties paid to 8.8%—to the Ephemeral License Fee to remove

the effect of the discarded licenses. In determining the Ephemeral License Fee for Business Establishment Services operating under an exemption to the digital performance right, the CARP considered separate licenses negotiated in the marketplace between individual record companies and these services. Its reliance on these agreements as an adequate benchmark for purposes of setting the rate for the section 112 license was well-founded and supported by the record. Therefore, the Register recommends adopting the Panel's proposal of setting the Ephemeral License Fee for Business Establishment Services at 10% of the service's gross proceeds. However, the Register cannot support the Panel's recommendation to set the minimum fee applicable to these

services for its use of the ephemeral license at \$500 when clear evidence exists in the contractual agreements to establish a much higher range of values for setting the minimum fee.

Consequently, the Register evaluated the contracts and proposed a minimum fee consistent with the record evidence.

The result is a minimum fee of \$10,000 per license pro rated on a monthly basis.

Section 802(f) states that "[i]f the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of that 90-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be." During that 90-day period, the Register reviewed the Panel's report and made a recommendation to the Librarian to accept in part and reject in part the Panel's report, for the reasons cited herein. The Librarian accepted this recommendation and, on May 21, 2002, he issued an order rejecting the Panel's determination proposing rates and terms for the webcasting license and the ephemeral recording license. See Order, Docket No. 2000-9 CARP DTRA 1&2 (dated May 21, 2002).

The full review of the Register and her corresponding recommendations are presented herein. Within the limited scope of the Librarian's review of this proceeding, "the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it." Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55757 (1997), citing 61 FR 55663 (October 28, 1996) (Distribution of 1990, 1991 and 1992 Cable Royalties). Accordingly, the Register accepts the Panel's weighing of the evidence and will not question findings and conclusions which proceed directly from the arbitrators' consideration of factual evidence. The Register, however, may reject a finding of the Panel where it is clear that its determination is not supported by the evidence in the record.

A. Establishing Appropriate Rates

1. The "Willing Buyer/Willing Seller Standard"

Sections 112(e)(4) and 114(f)(2)(B), of title 17 of the U.S.C., provide that "the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller," and enumerate two factors that the panel shall consider in making its decisions: (1) The effect of

<sup>12</sup> A non-CPB, noncommercial broadcaster is a Public Broadcasting Entity as defined in 17 U.S.C. 118(g) that is not qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

the use of the sound recordings on the sale of phonorecords, and (2) the relative contributions made by both industries in bringing these works to the public. In applying this standard, the Panel determined that it was to consider the enumerated factors along with all other relevant factors identified by the parties, but that it was not to accord the listed factors special consideration. Report at 21; see also Final Rule and Order, Rate Adjustment for the Satellite Carrier Compulsory License, Docket No. 96–3 CARP SRA, 62 FR 55742, 55746 (October 28, 1997).

Nevertheless, when the Panel considered the record evidence offered to establish a marketplace rate, it paid close attention to the two factors set forth in the statute. In analyzing the first factor, which focuses on the interplay between webcasting and sales of phonorecords, the panel found that the evidence offered during the proceeding was insufficient to demonstrate whether webcasting promoted or displaced sales of sound recordings. RIAA's evidence to demonstrate that performances of their sound recordings over the Internet displace record sales consisted of unsupported opinion testimony and consequently, the Panel afforded it no weight. Report at 33. Similarly, the Panel rejected the Webcasters contention that webcasting promoted sales, affording little weight to its empirical studies. It concluded that the Sounddata survey 13 was not useful for purposes of this proceeding because it focused on the promotional value of traditional radio broadcasts and not the promotional value of webcasting. Id. Likewise, the Panel rejected a study by Professor Michael Mazis 14 because the

response rates in the survey study fell below generally acceptable standards. All in all, the evidence on either side was not persuasive. Consequently, the Panel concluded that, for the time period under consideration, "the net impact of Internet webcasting on record sales [was] indeterminate." Id. at 34.

Broadcasters, however, disagree with the Panel's conclusions. They argue that the Panel should have made an adjustment for the promotional value of the transmissions, noting that the statute singled out this factor for consideration when setting the rates. Broadcasters Petition at 38. They further contend that the record demonstrates that "the promotional value of radio play should be far and away the most significant factor in determining the fair market value of broadcasters simulcast rates." Id. at 39-40. But all the evidence cited in the record references the interrelationship between radio stations and record companies in the analog world. As noted above, the Panel considered the evidence but did not find it persuasive.

Where the Panel makes a decision based upon its weighing of the evidence, the Register will not disturb its findings and conclusions that proceed directly from the Panel's consideration of the factual evidence. Thus, the Register accepts the Panel's conclusion that performances of sound recordings over the Internet did not significantly stimulate record sales. More importantly, though, the Panel correctly found that promotional value is a factor to be considered in determining rates under the willing buyer/willing seller model, and does not constitute an additional standard or policy consideration to be used after rates are set to adjust a base rate upwards or downwards. Report at 21. Therefore, the effect of any promotional value attributable to a radio retransmission would already be reflected in the rates for these transmissions reached through armslength negotiations in the marketplace.

As for the second factor, the Panel found that both copyright owners and licensees made significant creative, technological and financial contributions. It concluded, however, that it was not necessary to gauge with specificity the value of these contributions in the case where actual agreements voluntarily negotiated in the marketplace existed, since such

considerations, including any significant promotional value of the transmissions, would already have been factored into the agreed upon price. Id. at 35–36. This is not a contested finding.

It is also important at the outset of this review to distinguish the willing buyer/willing seller standard to be used in this proceeding from the standard that applies when setting rates for subscription services that operated under the section 114 license. They are not the same. Section 114(f)(1)(B), governing subscription services, requires a CARP to consider the objectives set forth in section 801(b)(1), as well as rates and terms for comparable types of digital audio transmission services established through voluntary negotiations. See Final Rule and Order, 63 FR 25394, 25399 (May 8, 1998). This standard for setting rates for the subscription services is policy-driven, whereas the standard for setting rates for nonsubscription services set forth in section 114(f)(2)(B) is strictly fair market value—willing buyer/willing seller. Thus, any argument that the two rates should be equal as a matter of law is without merit. See, e.g., Webcasters Petition at 4 (comparing rates set for preexisting subscription services under the policy driven standard with the proposed marketplace rates for nonsubscription services and inferring that the rates should be similar).

# 2. Hypothetical Marketplace/Actual Marketplace

To set rates based on a willing buyer/willing seller standard, the CARP first had to define the relevant marketplace in which such rates would be set. It determined, and the parties agreed, that the rates should be those that a willing buyer and willing seller would have agreed upon in a hypothetical marketplace that was not constrained by a compulsory license. The CARP then had to define the parameters of the marketplace: the buyers, the sellers, and the product.

In this configuration of the marketplace, the willing buyers are the services which may operate under the webcasting license (DMCA-compliant services), the willing sellers are record companies, and the product consists of a blanket license from each record company which allows use of that company's complete repertoire of sound recordings. Report at 24. Because of the diversity among the buyers and the sellers, the CARP noted that one would expect "a range of negotiated rates," and so interpreted the statutory standard as "the rates to which, absent special circumstances, most willing buyers and

<sup>13</sup> Michael Fine is an expert witness for the Webcasters and Broadcasters. He was the chief executive officer to Soundata, SoundScan and Broadcast Data Systems until December 31, 2000, and is now a management consultant to the firms operating these services. He analyzed data collected by these services to determine the promotional effect upon record sales from radio retransmissions and Internet-only transmissions and the displacement effect of record sales due to copying of sound recordings from Internet transmissions. Fine's W.D.T. at 1.

<sup>14</sup> Professor Mazis is a Professor in the Kogod School of Business, American University, who testified on behalf of the Webcasters and Broadcasters. He designed a survey study to analyze usage patterns of people who listen to simulcast of a radio station's over-the-air broadcast programming and transmissions made by services transmitting solely over the Internet. Specifically, the study was designed to measure:

a. The effect listening to transmissions over the Internet had on a listener's music purchases;

b. the extent to which listeners to radio retransmissions are either listeners from the broadcaster's local market or non-local listeners;

c. the amount of time spent listening to programming on the Internet and the proportion of

that time spent listening to music programming versus non-music programming; and

d. the reasons why people visit radio station websites and the activities they engage in when they visit these sites. Mazis' W.D.T. at 1–2.

willing sellers would agree" in a competitive marketplace. 15 Id. at 25.

The Services take issue with the Panel's analysis of the hypothetical marketplace. They argue that the willing sellers should be considered as a group of hypothetical "competing collectives each offering access to the range of sound recordings required by the Services," and not, as the Panel contends, viewed as individual record companies. Broadcasters Petition at 9; Webcasters Petition at 9-10. It is hard to see, however, how competition would be stimulated in a marketplace where every seller offers the exact same product and where more likely than not, the sellers would act in concert to extract monopolistic prices. Possibly sellers would choose to undercut each other, but at some point the price would stabilize. In any event, the Services failed to explain how such collectives would operate in a competitive marketplace. Consequently, the Register rejects the Webcasters' challenge to the Panel's definition on this point and adopts the Panel's characterization of the relevant marketplace, recognizing that for purposes of this proceeding, the major record companies are represented

by a single entity, the RIAA. Turning next to the actual marketplace in which RIAA negotiated agreements with individual services, the Services voice a number of objections to the Panel's decision to rely on the 26 voluntary agreements offered into evidence by RIAA. Specifically, the Services object to the use of the voluntary agreements because they fail to exhibit a range of negotiated rates among diverse buyers and sellers. Broadcasters Petition at 10; Webcasters Petition at 10. They also question the validity of relying on agreements negotiated during the early stages of a newly emerging industry, noting the Panel's admonition to approach such agreements with caution. Report at 47. The reason for the warning was Dr. Jaffe's 16 stated concern that such licenses "may not reflect fully educated assessments of the nascent businesses" long-term prospects."

The Services also argue that the existence of the antitrust exemption in the statutory license gave RIAA an

unfair bargaining advantage over the Services because RIAA represented the five major record companies who together owned most of the works. They contend that RIAA used its superior market power to negotiate supracompetitive prices with Services who could not match either RIAA's power in the marketplace or its sophistication in negotiating contracts. Moreover, they utterly reject the Panel's determination that RIAA's perceived market power was tempered by the existence of the statutory license, which, for purposes of negotiating a fair rate for use of sound recordings, leveled the playing field.

Webcasters Petition at 12. Not surprisingly, RIAA agrees with the Panel on this issue. It maintains that the statutory license offers the Services two clear advantages which more than offset any perceived advantage the RIAA may have had in negotiating a voluntary agreement. First, the license eliminates the usual transaction costs associated with negotiating separate licenses with each of the copyright owners. Second, services may avoid litigation costs associated with setting the rates for a statutory license provided they choose not to participate in the CARP process. RIAA reply at 12.

In essence, both sides articulate valid positions which are supported by the record. RIAA is clearly an established market force with extensive resources and sophistication. In fact, the Panel found that when RIAA negotiated with less sophisticated buyers who could not wait for the outcome of this proceeding, the rates were above-market value, and therefore, not considered by this CARP. Report at 54-56. Nevertheless, it would make no sense for RIAA to take any other position in a marketplace negotiation. Sellers expect to make a profit and will extract from the market what they can, just as buyers will do everything in their power to get the product at the lowest possible price. These are the fundamental principles

guiding marketplace negotiations. Such negotiations, however, were few. For the most part, webcasters chose not to enter into negotiations for voluntary agreements, knowing that they could continue to operate and wait for the CARP to establish a rate. Such actions on the part of the users clearly impeded serious negotiations in the marketplace and support the CARP's observation that the statutory license had a countervailing effect on the negotiation process and limited the ability of RIAA to exert undue marketplace power. See Tr. 9075-77, 9490-94 (Marks) (explaining the difficulties of bringing webcasters to the negotiating table due to the statutory

license). Thus, the CARP could only consider negotiated rates for the rights covered by the statutory license that were contained in an agreement between RIAA and a Service with comparable resources and market power.

The only agreement that met these criteria was the Yahoo!<sup>17</sup> agreement. The Panel found that both parties to that agreement entered into negotiations in good faith and on equal footing. Moreover, RIAA's negotiating advantage disappeared. RIAA could not extract super-competitive rates because Yahoo! brought comparable resources, sophistication, and market power to the negotiating table.

Moreover, Yahoo! could have continued to operate under the license and wait for the outcome of this proceeding. Yet, Yahoo!, unlike most of the other Services, did not take this course of action. It wanted a negotiated agreement so that it could fully develop its business model based on certainty as to the costs of the use of the sound recordings. Consequently, it had every incentive to negotiate a rate that reflected its perception of the value of the digital performance right in light of its needs and position in the marketplace. Had RIAA insisted upon a super competitive rate, Yahoo! could have walked away and waited for the CARP to set the rates. RIAA Reply at 13. Thus, it was not arbitrary for the Panel to consider the negotiated agreement between Yahoo! and RIAA. It met all the criteria identified by the CARP (discussed above) that characterized the hypothetical marketplace: Yahoo! was a DMCA-compliant Service; RIAA represented the interests of five independent record companies, and the license granted the same rights as those offered under the webcasting and the ephemeral recording licenses.

The Webcasters make one final argument concerning use of licenses negotiated in the marketplace. They fault the Panel for its reliance on a contract for which there was no prior marketplace precedent for setting a rate. Webcasters Petition at 15. Yet, that alone cannot be a reason to reject

<sup>15</sup> The panel used the same analysis for setting the rates for the ephemeral recording license because the statutory language defining the standard for setting rates for the ephemeral recording license is nearly identical to the standard set forth in section 114.

<sup>&</sup>lt;sup>16</sup> Adam Jaffe is a Professor of Economics at Brandeis University. He is also the Chair of the Department of Economics and the Chair of the University Intellectual Property Policy Committee. He testified on behalf of the Webcasters and the Broadcasters.

<sup>17</sup> Yahoo! is a streaming service which provides a retransmissions of AM/FM radio stations and programming from other webcaster sites. Report at 61. Yahoo! is also a global Internet communications, commerce and media company, offering comprehensive services to more than 200 million users each month. Content for its features like Yahoo! Finance, Yahoo! News, and Yahoo! Sports, are typically licensed from third parties. Mandelbrot W.D.T. ¶ 3–5.

The Panel was well aware of the many faces of Yahoo! Nevertheless, it found no reason to reject the Yahoo! agreement merely because it offered other business services. See Report at 76, in 53.

consideration of agreements negotiated in the marketplace, albeit at an early stage in the development of the industry. At some point, rates must be set. Such rates then become the baseline for future market negotiations. RIAA recognized an opportunity to participate in this initial phase and moved forward to negotiate contracts with users with the intention of using these contracts to indicate what a willing buyer would pay in the marketplace. However, that was easier said than done. As discussed above, most Webcasters chose not to enter into marketplace agreements, preferring to wait for the outcome of the CARP proceeding in the hope of getting a low rate. Clearly, such resistance to enter into good faith negotiations made it difficult for the copyright owners to gauge the market accurately and find out just what a willing buyer would be willing to pay for the right to transmit a sound recording over the Internet.

3. Benchmarks for Setting Market Rates: Voluntary Agreements vs. Musical Works Fees

The parties offer two very different methods for setting the webcasting rates. RIAA argued that the best evidence of the value of the digital performance right is the actual rates individual services agreed to pay for the right to transmit sound recordings over the Internet. In support of its position, it offered into evidence 26 separate agreements it had negotiated in the marketplace prior to the initiation of the CARP proceeding. The Services take a different approach. They dispute the validity of the contracts as a bases for marketplace rates and offer in their place a theoretical model (the "Jaffe model") predicated on the fees commercial broadcasters pay to use musical works in their over-the-air AM/ FM broadcast programs.

The Jaffe model builds on the premise that in the hypothetical marketplace, copyright owners would license their digital performance rights and ephemeral recording rights at a rate no higher than the rates music publishers currently charge over-the-air radio broadcasters for the right to publicly perform their musical works. Report at 28, citing Webcasters PFFCL ¶¶ 276–78; Jaffe W.D.T. 16–19. To find the rate copyright owners would charge under this model, Webcasters calculated a per performance and a per hour rate by using the aggregate fees that 872 over-

the-air radio stations paid in 2000 to the performing rights organizations BMI, ASCAP, and SESAC. 19 It combined the fee data with data on listening audiences obtained from Arbitron to generate an average fee paid by an overthe-air broadcaster per "listening hour." From this value, Webcasters calculated a per performance fee by dividing the "listener hour" fee by the average number of songs played per hour by music-intensive format stations. Id. These calculations yielded a per song fee of 0.02¢ or, in the alternative, a per listener hour fee of 0.22¢. For purposes of webcasting, these values were adjusted upward to reflect the fact that, on average, webcasters play 15 songs per hour, as compared to the 11 perhour played on over-the-air radio. The webcaster per hour rate works out to be 0.3 instead of 0.2¢ per hour.

After carefully considering both approaches, the Panel chose to focus on the RIAA agreements. In rejecting Dr. Jaffe's theoretical model, the panel cited three reasons for its conclusion. First, the Panel expressed strong concern regarding the construct of the model, including: 1. The difficulty in identifying all the factors that must be considered in setting a price, and 2. The inherent error associated with predicating a prediction on a "string of assumptions," especially where the level of confidence in many of the assumptions is not high. Second, the Panel was wary of analogizing the market for the performance of musical works with the market for the performance of sound recordings, finding instead that the two marketplaces are distinct based upon the difference in cost and demand characteristics. And finally, the Panel determined that the Jaffe model was basically unreliable. It could not be used to predict accurately the amount of royalty fees owed to the performing rights societies by a particular radio station. It came to this conclusion after using the model to predict the royalty fees owed by a particular station and comparing that figure to the amount the radio station actually paid. For some radio stations, the model severely underestimated the amount owed to the performing rights societies, thus, drawing into serious question the reliability of the model. Report at 42.

a. Fees paid for use of musical works. The Broadcasters and the Webcasters fault the Panel for disregarding the fees paid for musical works as a viable benchmark. Webcasters Petition at 15, 47. They maintain that Dr. Jaffe's analysis proves that the value of the performance of the sound recording is no higher than the value of the performance of the musical work. Webcasters argue that the fees for musical works constitute a valid benchmark because these rates are the result of transactions between willing buyers and willing sellers over a long period of time, in a marketplace that shares economic characteristics with the marketplace for sound recordings. Webcasters Petition at 48. The Broadcasters agree. They maintain that even under the willing buyer/willing seller standard, "the over-the-air musical works license experience \* \* \* has resulted in fees 'to which most willing buyers and willing sellers [have] agree[d]' and constitute 'comparable agreements negotiated over a longer period, which ha[ve] withstood 'the test of time." Broadcasters Petition at 45-46, citing Report at 25, 47.

Broadcasters and Webcasters also object to the Panel's characterization of its proposed benchmark as merely a theoretical model. Webcasters Petition at 51. They maintain that Dr. Jaffe's model was much more than a theoretical model because it used actual data from the musical works marketplace to calculate an analogous rate for use of sound recordings in the digital marketplace. Consequently, these Services contend that the Panel gave inadequate consideration to their proposed benchmark and rejected the model out of hand because it was purported to be only a theoretical model based upon a number of untested assumptions. Broadcasters Petition at 18–19; Webcasters Petition at 18–20, 52.

Finally, the Services argue that the statute does not compel the Panel to consider only negotiated agreements. They also contend, that the reliance on the fees paid for use of the musical works in a prior CARP proceeding to establish rates for subscription services operating under the same license required the panel to give more consideration to the musical works benchmark. Broadcaster's Petition at 1-2; Webcasters Petition at 1-2, 15, 17, 47. Webcasters find support for this last argument in an Order of the Copyright Office issued in this proceeding, dated July 18, 2001.

In that order, the Office acknowledged that in 1998 it had adopted the rates paid for musical works fees as a relevant benchmark for setting rates for

<sup>&</sup>lt;sup>18</sup> A "musical work" is a musical composition, including any words accompanying the music. A "sound recording" is a work that results from the fixation of a series of musical, spoken, or other sounds, other than those accompanying a motion picture or other audiovisual work.

<sup>&</sup>lt;sup>19</sup> BMI, Inc., American Society for Composers, Authors and Publishers, and SESAC, Inc. are performing rights organizations that represent songwriters, composers and music publisehrs in all genres of music. These societies offer licenses and collect and distribute royalty fees for the nondramatic public performances of the copyrighted works of their members.

subscription services. It stated, however, that the evidence in that case did not support a conclusion that the value of the sound recording exceeded the value of the musical work. Moreover, and directly to the point, the Register's recommendation in the earlier proceeding concurred with the earlier Panel's determination that the musical works benchmark is NOT determinative of the marketplace value of the performance right in sound recordings. The relevant passage states: "The question, however, is whether this reference point (the musical works benchmark) is determinative of the marketplace value of the performance in sound recordings; and, as the Panel determined, the answer is no." 63 FR 25394, 25404 (May 8, 1998).

The July 18 Order went on to note that in the subscription service proceeding, "[h]ad there been record evidence to support the opposite conclusion, [namely, that the value of sound recordings exceeds the value of musical works], the outcome might have been different." This statement was an invitation to the parties to provide whatever evidence they could adduce in this proceeding to establish the value of the sound recording. It was not to be read as an absolute determination, that the value of the sound recording in a marketplace unconstrained by a compulsory license is less than the value of the underlying musical work. Instead, the Order stated that "the musical work fees benchmark identified in a previous rate adjustment proceeding as the upper limit on the value of the performance of a sound recording may or may not be adopted as the outer boundary of the "zone of reasonableness" in this proceeding. This is a factual determination to be made by the CARP based upon its analysis of the record evidence in this proceeding.

It is also important to note that in the prior proceeding, the only reason the Register and the Librarian focused on the musical works benchmark was because it was the only evidence that remained probative after an analysis of the Panel's decision. Each of the other benchmarks possessed at least one fatal deficiency and, consequently, each was rejected as a reliable indicator of the value of the performance of a sound recording by a subscription service. Of equal importance is the fact that the musical works benchmark had never been fully developed in the record, nor had any party relied on it to any great extent in making its case to that Panel. Consequently, it was not arbitrary for the Panel to reject the Services invitation to anchor its decision for setting rates for nonsubscription

services on the prior decision setting rates for preexisting subscription services.

Moreover, the Panel is not required to justify why the rates it ultimately recommended here are greater than the rates preexisting subscription services pay for use of the musical works. That is merely the result of the analysis of the written record before this Panel, and its decision flows naturally from its reliance upon contractual agreements negotiated in the relevant marketplace for the right at issue. This difference in the rates is also attributable to the different standards that govern each rate setting proceeding. As discussed previously in section IV.1, the standard for setting rates for subscription services is policy based and not dependent upon market rates. Consequently, it is more likely that the rates set under the different standards will vary markedly, especially when rates are being set for a new right in a nascent industry.

Nevertheless, the Register agrees with the Services on a number of theoretical points. Certainly, the Panel could have utilized Dr. Jaffe's model in making its decision, either alone or in conjunction with the voluntary agreements, provided that it considered the model's deficiencies, and made appropriate adjustments for the fact that the model required reliance on a string of assumptions to perform the conversion of a rate for the public performance of a musical work in an analog environment, into a comparable rate for the public performance of a sound recording in a digital format. See AMOA v. CRT, 676 F2d 1144 (7th Cir. 1982). But the fact remains that it was not required by law to do so. The Panel was free to choose any of the benchmarks offered into the record or to rely on each of them to the degree they aided the Panel in reaching its decision. See, e.g., Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting, 43 FR 25068-69 (CRT found voluntary license between BMI Inc., and the public broadcasters, Public Broadcasting System and National Public Radio, of no assistance in setting rates for use of ASCAP repertoire).

The Register also rejects the Services' contentions that the Panel failed to consider fully Dr. Jaffe's model. See Webcasters Petition at 20, 52. The Panel did consider Jaffe's model and concluded that it need not consider alternative benchmarks that are at best analogous when it had actual evidence of marketplace value of the performance of the sound recordings in the record. Report at 42. It also rejected the offer to utilize the model because the underlying assumptions were in many

instances questionable. For example, the Panel did not accept the assumptions that a percentage of revenue model could be converted accurately to a per performance metric, or that the buyers and sellers in the two marketplaces are analogous.

Broadcasters assert that they had established that the value of the musical work is higher than the comparable right for sound recording based on the fees paid for use of these works in movies and television programs. Broadcasters Petition at 24. In addition, they offered a study of the fees paid for these rights in twelve foreign countries where the Services claim these rights are valued more or less equally. *Id.* at 24, 49. Because the Panel failed to analyze this information, the Services argue, the Panel's rejection of the musical benchmark was arbitrary.

RIAA responds that the information offered on the fees paid for the public performance of sound recordings fails to establish that in these countries sound recordings are valued according to a "willing buyer/willing seller" standard. RIAA Reply at 20, fn 36. In fact, many of the countries surveyed evidently use an "equitable remuneration" standard, which courts have held not to be equivalent to a fair market value. Because it is not possible to ascertain whether any of the rates offered in the survey of foreign countries represented a fair market rate, or that the rights in these countries are equivalent to the rights under U.S. law, the Panel was not arbitrary in its decision to disregard this evidence. The Register also concludes that the Panel's decision not to consider master use and synchronization licenses for use of musical works and sound recordings in motion pictures and television was not arbitrary. At best, these licenses offered potential benchmarks for evaluating the digital performance right for sound recordings, and they may well have been useful had not actual evidence of marketplace value of the sound recordings existed. In any event, they did not represent better evidence than the voluntary agreements negotiated in the marketplace for the sound recording digital performance

b. Voluntary agreements. On the other hand, the Panel articulated two affirmative reasons for its focus on the negotiated agreements. First, the statute invites the CARP to consider rates and terms negotiated in the marketplace. Second, the Panel accepted the premise that the existence of actual marketplace agreements pertaining to the same rights for comparable services offers the best evidence of the going rate. Report at 43, citing Jaffe Tr. at 6618.

But in choosing this approach, the Panel did not accept the 26 voluntary agreements at face value. It evaluated the relative bargaining power of the buyers and sellers, scrutinized the negotiating strategy of the parties, considered the timing of the agreements, discounted any agreement that was not implemented, eliminated those where the Service paid little or no royalties or the Service went out of business, and evaluated the effect of a Service's immediate need for the license on the negotiated rate. See Report at 45-59.20 Ultimately, it gave little weight to 25 of the 26 agreements for these reasons and because the record demonstrated that the rates in these licenses reflect abovemarketplace rates due to the superior bargaining position of RIAA or the licensee's immediate need for a license due to unique circumstances. At best, the Panel concluded that the rates included in these agreements establish an upper limit on the price of the digital performance right, and where included, the right to make ephemeral copies. Report at 59.

RIAA objects to the Panel's decision to reject 25 of the 26 agreements on the grounds that the Panel's criticisms were overbroad. RIAA Petition at 34. Specifically, it claims that the Panel mischaracterized its agreement with www.com/OnAir ("OnAir"), arguing that this Licensee paid substantial royalties and its decision to enter into the agreement was not motivated by special circumstances as the CARP claimed. Id. at 31. This observation, however, is not sufficient to overcome the Panel's conclusion in regard to this agreement, especially in light of the testimony of RIAA's own expert witness, Dr. Nagle, who testified the Panel should give no consideration to any agreement with a licensee who cannot survive in the marketplace. Report at 24. Had OnAir continued to operate in the marketplace and renew its license with RIAA, the Panel might have given it more serious consideration. But again, it was not required to do so, especially when the Panel found more probative evidence in the record upon which to rely

Likewise, RIAA objected to the Panel's decision not to give any weight to the MusicMusicMusic ("MMM") agreement, arguing in this case that the

<sup>20</sup>The Panel also considered, and ultimately rejected three offers of corroborating evidence made by RIAA in support of its position that all 26 agreements should be used in setting the royalty rates: (1) License agreements for making [material redacted subject to Protective Order]; (2) prior case law articulating a method for assessing damages in patent infringement cases; and (3) a pricing strategy analysis.

Panel assumed MMM had renewed its agreement in 2001 for the same reasons that led it to accept a higher than market value rate in 1999, RIAA Petition at 32. Webcasters respond that RIAA misrepresents the facts of the renewal. They maintain that MMM renewed the agreement in 2001 based on "many of the same motivating factors" that led to the initial agreement, including its concerns about its long-term relationship with RIAA in other areas. Webcasters Reply at 29. Because the evidence supports a rationale for MMM to accept a higher than marketplace rate, it was not arbitrary for the Panel to decide not to adopt it as an adequate benchmark. The Panel need not rely on the MMM agreement when it had another agreement negotiated in the marketplace that did not suffer from the same perceived shortcomings.

Specifically, the Panel gave significant weight to the one remaining agreement negotiated—the RIAA-Yahoo! agreement-and used it as a starting point for setting the rates for the webcasting license and the ephemeral recordings license. The Panel found this agreement particularly reliable and probative because: (1) Yahoo! was a successful and sophisticated business which, to date, had made well over half of all DMCA-compliant performances; (2) it had comparable resources and bargaining power to those RIAA brought to the table; and (3) the agreement provided for different rates for different types of transmissions. See Report at 64-67; 70. While the first two reasons offer strong support for the Panel's decision to rely upon the Yahoo! agreement, the third reason is questionable in the context of the Ŷahoo! agreement because the different rates do not actually represent the parties' understanding of the value of the performance right for these types of transmissions. See discussion infra,

section IV.5. Webcasters, however, argue that the Panel's reliance on the Yahoo! agreement was fatal because it selected a single term out of a multifaceted contract. Webcasters at 22-23. Specifically, they maintain that the webcasting rate did not reflect merely the value of the sound recording, but an abundance of trade-offs that met the needs of RIAA and Yahoo!. Id. at 24. Webcasters make this argument because, in a prior CARP proceeding, the Register had refused to adopt a complicated partnership agreement that purportedly included a rate for the digital performance right as a benchmark for setting the statutory rate. See, Rate Setting Proceeding for Subscription Services, 63 FR 25394 (May 8, 1998).

Specifically, the Register concluded that "it was arbitrary for the Panel to rely on a single provision extracted from a complex agreement where the evidence demonstrates that the [rate] provision would not exist but for the entire agreement." Id. at 25402.

The two agreements, however, are not analogous. The primary purpose of the Yahoo! agreement was to set a rate for use of sound recordings over the Internet. Thus, the noted trade-offs in this agreement were all directly tied to considerations relating to the value of the performance right, and did not affect its validity as a benchmark. Such was not the case with the subscription services agreement offered into evidence in the prior proceeding, where the performance right component was merely "one of eleven interdependent co-equal agreements which together constituted the partnership agreement between [Digital Cable Radio Associates ("DCR")] and the record companies." Id.

Along these same lines, the Services challenge the Panel's dependence upon a single contract negotiated between a single seller (RIAA) and a single buyer (Yahoo!), especially in light of the Panel's construct of the hypothetical marketplace. Broadcasters Petition at 14; Live365 Petition at 5; Webcasters Petition at 9, 14. These parties argue that under 17 U.S.C. 114(f)(2)(B), the Panel had discretion to consider negotiated agreements only when the agreements were for comparable types of services in comparable circumstances. Webcasters, including Live365, maintain that Yahoo! had a unique position among webcasters and argue that it was manifestly arbitrary for the Panel to set rates based solely on the rates paid by this one webcaster which by its own admissions was not similarly situated with other webcasters. Live365 Petition at 11; Webcasters Petition at 27. Specifically, they contend that Yahoo! had little concern about getting a reasonable rate for Internet-only transmissions so long as the rate for RR transmissions was favorable and it could continue to grow in this arena. Webcasters note that Yahoo!'s main business was the retransmission of radio re-broadcasts, and that over 90% of all transmissions made by Yahoo! fall within this category. Id. at 28. Consequently, Webcasters maintain that the rates set for Internet-only transmissions in the Yahoo! agreement cannot be fairly applicable to Webcasters at large. Id. at 29.

Broadcasters have other complaints with the Panel's approach. First, they object to the use of the Yahoo! contract to set rates for broadcasters when the buyer in that case was not a broadcaster but a third-party aggregator-a completely different type of business. Second, they fault the Panel for its failure to follow its own dictate to proceed cautiously when viewing contracts negotiated in a nascent industry for newly created rights. Broadcaster Petition at 14. Similarly, Webcasters fault the Panel for relying exclusively on the Yahoo! agreement because it offers only a single, uniform rate for each type of transmission, in contrast to the "range of rates," involving "diverse buyers and sellers," that the Panel identified as the hallmark of a willing buyer/willing seller marketplace." Webcasters Petition at 14. Webcasters also contend that the Yahoo! agreement should not have been considered because it, like the Lomasoft-RIAA agreement, had not been renewed. Webcasters Petition at 41.

Moreover, Live365 questions the Panel's reliance on the Yahoo! contract when it had rejected use of a second similar agreement between MusicMatch ("MM") and RIAA because MM had accepted higher than marketplace rates for nearly identical reasons to those that account for the inflation in the Yahoo! rates. MM had wished to settle litigation with RIAA and it received a benefit from the inclusion of a Most Favored Nations (MFN) clause in the contract. Yet, in spite of the similarities, the Panel relied on the Yahoo! agreement and disregarded the second one. Such disparate treatment of similarly situated services is arguably arbitrary. Live365 Petition at 13. A closer examination of the agreements, however, reveals a significant difference between the two contracts which allowed the Panel to disregard the MM agreement for further consideration. Most importantly, the MM agreement contained a MFN clause that [material redacted subject to a protective order]. The Panel reasoned that this provision undermined the usefulness of the agreement to establish a marketplace rate because [material redacted subject to a protective order]. Report at 56-57. Such was not the case with the Yahoo! agreement since the MFN clause only allowed Yahoo! to receive a partial benefit commensurate with [material redacted subject to a protective order]. Report at 62.

The Register concurs and agrees with the Panel's observation that it would be unsound to establish a rate for the statutory license using a rate that itself is subject to change based on the outcome of this proceeding.

The Register also finds the other

The Register also finds the other arguments by the parties unavailing. In spite of their objections, the Services' own expert, Dr. Jaffe, agreed in principle with the Panel's approach. In his

testimony, he acknowledged that voluntary agreements between a willing buyer and a willing seller would constitute the best evidence of reasonable marketplace value if such agreements were between parties comparable to those using the webcasting license. Tr. 6618 (Jaffe). The Services' argument, of course, is that the Yahoo! agreement is not a comparable agreement for purposes of setting rates for all webcasters, and this appears to be a valid point. Yahoo!'s business model is somewhat unique. Unlike webcasters that create their own programming, Yahoo! merely offers programming by AM/FM radio stations and other webcasters.

Nevertheless, RIAA offers record evidence that contradicts the Webcasters' assertion that Yahoo! is not a comparable service for purposes of this proceeding, noting that many webcasters affirmatively stated that Yahoo! is a competitor. Moreover, RIAA asserts that the number of the performances made by Yahoo! on its Internet-only channels is roughly equivalent to the number of performances made by the other webcasters in this proceeding and, therefore, Yahoo!'s interest in getting a reasonable rate for its Internet-only stations should be comparable to those of the Webcasters in this proceeding. RIAA reply at 33-34.

Because Yahoo! is engaged in both types of transmissions, it is reasonable to accept this agreement as a basis for setting rates for both types of transmissions. Yahoo! has developed a significant business presence in the marketplace for Internet-only transmissions and understands the marketing and business of Internet-only webcasters. Consequently, allegations that Yahoo! has only a de minimis interest in the webcasting field and is thus less interested in getting a reasonable rate for the right to make digital transmissions are without merit. The question, however, is whether each rate in the Yahoo! agreement reflects the actual value of the particular transmission or whether one must consider both rates in concert to understand the valuation process. For a more detailed discussion on this point, see section IV.5 infra.

#### 4. Alternative Methodology: Percentageof-Revenue

The Panel also carefully considered and rejected a percentage-of-revenue model for assessing fees and determined that a per performance metric was preferable to a percentage-of-revenue model. A key reason for rejecting the percentage-of-revenue approach was the

Panel's determination that a per performance fee is directly tied to the right being licensed. The Panel also found that it was difficult to establish the proper percentage because business models varied widely in the industry, such that some services made extensive music offerings while others made minimal use of the sound recordings. Report at 37. The final reason and perhaps the most critical one for rejecting this model was the fact that many webcasters generate little revenue under their current business models. As the Panel noted, copyright owners should not be "forced to allow extensive use of their property with little or no compensation." Id, citing H.R. Rep. 105-796, at 85-86. Thus, it seemed illogical to set a rate for the statutory license on a percentage-of-revenue basis when in fact a large proportion of the services admit they generate very little revenue, and, therefore, would generate meager royalties even for substantial uses of copyrighted works. Moreover, it is highly unlikely that a willing seller, who negotiates an agreement in the marketplace, would agree to a payment model which itself could not provide adequate compensation for the use of its sound recordings. Nevertheless, Webcasters and Live365

assert that the Panel acted arbitrarily when it failed to provide a revenuebased royalty option. Webcasters at 54. They maintain that both sides advocated adoption of a percentage-of-revenue option, see RIAA PFFCL, Appendix C; Webcasters PFFCL ¶¶ 283–296, and that it was arbitrary for the Panel to refuse to adopt this approach. See Live365 Petition at 10; see also pg. 11, fn 6. Webcasters also assert that they had made clear that in the event the Panel rejected Jaffe's model, a revenue-based alternative license proposal would be necessary to avoid putting certain webcasters out of business. Webcasters Petition at 56, 60. Moreover, Webcasters reject the Panel's conclusion that the Sérvices' revenue-based fee proposal was untimely. Id., at 57-60. They maintain that under § 251.43(d) they were allowed to revise their claim or their requested rate "at any time during the proceeding up to the filing of the proposed findings of fact and conclusions of law," and that the Panel had no authority to alter this provision by order under § 251.50.21

Continued

<sup>&</sup>lt;sup>21</sup> Section 251.50 of the 37 CFR provides that: In accordance with 5 U.S.C., subchapter II, a Copyright Arbitration Royalty Panel may issue rulings or orders, either on its own motion or that of an interested party, necessary to the resolution of issues contained in the proceeding before it; Provided, that no such rules or orders shall amend,

In reply, RIAA notes that the Webcasters cite no evidence for their assertion that they reasonably believed the Panel would offer a percentage-ofrevenue option and counters their timeliness argument by setting forth the timeline regarding the parties's submissions concerning the rates. RIAA Reply at 62. Evidently at the request of the Webcasters, the Panel issued an order setting November 2 as the deadline for submitting revised or new rate proposals, so that parties were fully aware of each other's position and could style their findings of fact and conclusions of law accordingly. Consequently, the Panel found that the Services' later submission including a proposed rate based on percentage-ofrevenue in their PFFCL was untimely. Report at 31, citing Order of November 3, 2001.

After considering the arguments now advanced by the Services concerning the Panel's authority to require final submissions on rates prior to the filing of the PFFCLs, the Register finds that the Panel acted in a lawful manner and within its authority. As RIAA points out in its reply, the Panel has authority pursuant to 37 CFR 251.42 to waive or suspend any procedural rule in this proceeding, including the time by which parties must make final submissions regarding proposed rates. What the Panel cannot do is engage in a rulemaking proceeding to amend, supplement, or supersede any of the rules and regulations governing the CARP procedures. See 37 CFR 251.7. Moreover, the language in § 251.43 is somewhat ambiguous as to when a party can make its final rate proposal, lending itself to two interpretations. For this reason alone, it was prudent for the Panel to issue an order clarifying the application of the rule for purposes of this proceeding. In fact, Webcasters had asked for this ruling and cannot be heard at the end of the process to argue against a ruling that they sought and to which they never objected. Consequently, the Panel was not arbitrary when it found the Webcasters' request for a percentage-of-revenue fee structure untimely.

Moreover, the Panel was not arbitrary for failing to adopt a percentage-of-revenues model merely because some parties voiced an expectation that the Panel would offer such a model as an alternative means of payment. This complaint of unmet expectations is not a substantive argument for finding the Panel's decision arbitrary and,

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supplement or supersede the rules and regulations

contained in this subchapter. See § 251.7.

consequently, it will not be considered further.

On the other hand, Live365 does make a substantive argument concerning the Panel's decision not to adopt a percentage-of-revenue model. It notes that the current marketplace uses two types of rate structures, a revenue based model and a performance rate structure, and that the revenue based model is better for start-up and smaller webcasters. Live365 Petition at 8. In fact, Live365 points out that many of the agreements that RIAA negotiated with webcasters incorporated this model. Moreover, Live365 maintains that it was arbitrary for the Panel to propose rates that "had the effect of rendering sound recordings substantially more valuable than musical works, even though the CARP acknowledged that it was rendering no opinion on this issue." Live365 Petition at 5, 14-15. In its opinion, this result was arbitrary based upon Yahoo!'s stated perception that the value of the performance right for the musical work is comparable to the value of the performance right for the sound recording. Finally, Live365 argues that rates based upon mere perception, as those negotiated in the Yahoo! agreement, are by their very nature arbitrary and should be disregarded. Id. at 15

RIAA refutes the Services' claim that the Panel was arbitrary because it failed to offer a percentage-of-revenue model. It argues that the record supports the Panel's conclusion that a percentage-ofrevenue model would have been difficult to implement because Services use sound recordings to different degrees—a position taken by the Webcasters' own witness. Specifically, Jaffe questioned the appropriateness of using a percentage-of-revenue model where those percentages were based on the economics driving over-the-air broadcasts. RIAA Reply Petition at 52, citing Tr. 6487, 6488, 12582 (Jaffe). Jaffe also acknowledged that it was difficult to assess what the revenue base should be for such a model given the variation of the business models utilized by the webcasters. RIAA also notes that section 114(f)(2)(B) requires the Panel to consider the quantity and nature of the use of the sound recording and argues that a per performance metric automatically accounts for the amount of use by the various services. RIAA Reply at 59.

RIAA also argues that a basic percentage-of-revenue fee structure would frustrate the purpose of the law because it would deny copyright owners fair compensation for use of their works in those situations where a service generates little or no revenue. Certainly,

the record contains evidence that a number of webcasters do not expect or intend to earn revenues from their webcasts, see Report at 37; see, e.g. Live365 Petition at 7, maintaining that their use is designed primarily to maintain their over-the-air audience. Because certain Services take this approach, when RIAA did consider using a percentage-of-revenue model, it included a substantial minimum fee proposal in conjunction with the percentage of fee proposal to address the problems associated with low revenue generating businesses. Specifically, the RIAA proposal required that a Service pay either 15% of revenues or \$5,000 per \$100,000 of a webcasters' operating costs, whichever is greater. RIAA Reply at 61. In this way, RIAA sought to avoid the anomaly of allowing a business unfettered use of the sound recordings without reasonable compensation to the copyright owners. Id. at 54, 61. This formulation, however, would not have given the webcasters the relief they seek through the adoption of a rate based on a percentage-of-revenues. In fact, under RIAA's percentage-of-revenue formulation, many webcasters, including Live365, would have paid more than they will under the Panel's per performance rate structure.

The Register finds that the Panel's decision not to set a percentage-ofrevenue fee option was not arbitrary in light of the record evidence. First, it is clear that the Services' primary position was to seek adoption of a fee based upon performances and not a percentage-of-revenue. Indeed, Dr. Jaffe's model proposed a fee model based on listener hours or number of listener songs, and not a rate based upon percentage-of-revenues, because a royalty based upon actual performances would be directly tied to the nature of the right being licensed. Report at 37; Jaffe W.R.T. at 31. Moreover, because they took this position, Services argued for a low minimum rate that would only cover administrative costs and not the value of the performances themselvesan approach the CARP adopted in its Report.

Moreover, the statute does not require the CARP to offer alternative fee structures, and the Services should not have expected the Panel to do so, especially when the Webcasters never advanced a percentage-of-revenues option in their own case. In fact, there is no precedent in the statutory licensing scheme anywhere in the Copyright Act that would support alternative rates for the same right. Clearly, it cannot be arbitrary for the Panel to choose not to deviate from the

longstanding practice of establishing only one rate schedule for a license.

5. The Yahoo! Rates—Evidence of a Unitary Marketplace Value

The starting point for setting the rates for the webcasting license is the Yahoo! agreement. In that agreement, rates were set for two different time periods. For the initial time period covering the first 1.5 billion performances, Yahoo! agreed to pay one lump sum of \$1.25 million. From this information, the Panel calculated a "blended," per performance rate of 0.083¢. This value represents the actual price that Yahoo! paid for each of the first 1.5 billion transmissions without regard to which type of service made the transmission. For the second time period, Yahoo! and RIAA agreed to a differential rate structure. One rate was set for performances in radio retransmissions (RR) (0.05¢ per performance) and another rate was set for transmissions in Internet-only (IO) programming (0.2¢ per performance). These rates were first used in early 2000 and do not apply to the first 1.5 billion performances.

However, the CARP did not accept these differentiated rates at face value. The Panel engaged in a far-ranging inquiry to determine how the parties established the negotiated rates. What it found was that Yahoo! agreed to a higher rate for the IO transmissions in exchange for a lower rate for the RR because this arrangement addressed specific concerns of both parties. In particular, RIAA wished to establish a marketplace precedent for IO transmissions in line with rates it had negotiated in earlier agreements, while Yahoo! sought to negotiate rates which, in the aggregate, yielded a rate it could accept. Consequently, the Panel found the rate for the IO transmissions to be artificially high and, conversely, the rates for the RR to be artificially low. For this reason, it made a downward adjustment to the IO rates and an upward adjustment to the RR rates.

Before making this adjustment, though, the Panel had to consider whether it was reasonable to establish separate rates for the two categories of transmissions. In reaching its decision, the Panel considered two facts, the fact that the Yahoo! agreement provided for two separate rates, and the fact that all parties agreed that performances of sound recordings in over-the-air radio broadcasts promote the sale of records. Report at 74. Based on this finding, the Panel concluded that a willing buyer and a willing seller would agree that the value of the performance right for RR would be considerably lower than for IO transmissions. Moreover, it attributed

the existence of the rate differential in the Yahoo! agreement to the promotional value enjoyed by the copyright owners from the performance of the sound recordings by broadcasters in their over-the-air programs, and not to promotional value attributable to transmissions made over the Internet. Report at 74-75. Specifically, the Panel found that, "to the extent that Internet simulcasting of over-the-air broadcasts reaches the same local audience with the same songs and the same DJ support, there is no record basis to conclude that the promotional effect is any less."

Report at 75. This finding, however, did not prompt the Panel to make any further adjustment for promotional value, finding instead that the differential rates in the Yahoo! agreement already reflect "marketplace assessment of the various promotion and substitution effects, along with a myriad of other factors." Report at 87. Primary among these factors were the Most Favored Nations (MFN) clause 22 and the cost savings to Yahoo! in avoiding CARP litigation. The Panel reasoned that Yahoo! was willing to accept somewhat inflated royalty rates in exchange for the costs it saved by not participating in the CARP proceeding, and for the MFN clause which had some indeterminate value for

Yahoo!.

RIAA disagrees with the Panel's analysis and these findings. As an initial matter, it maintains that there was no record evidence to support a separate rate for commercial broadcasters. RIAA Broadcaster PFOF 24-52. Second, it argues that the Panel adopted a two-tier rate structure for RR and IO transmissions based on the different rates in the Yahoo! agreement, and its mistaken view of the significance of an exemption in the law for a retransmission of a radio station's broadcast transmission within a 150 mile radius of the radio broadcast transmitter in setting the rate for radio retransmissions.23 See 17 U.S.C. 114(d)(1)(B).

Although RIAA maintains that in its negotiations with Yahoo! it had argued that the value of the radio retransmission should not be based on the location of the original radio broadcast transmitter, it claims that it

<sup>22</sup> The MFN clause in the Yahoo! agreement is discussed in detail in section IV.3, pg. 27.

was nervous about the application of the 150-mile radius exemption to retransmissions made by third-party aggregators, like Yahoo!. Consequently, RIAA maintains that it agreed to a lower rate for radio retransmissions, knowing that its arguments for not exempting these transmissions were weak, and because Yahoo! agreed to pay for each transmission without regard to the exemption. The resulting adjustment for the 150-mile exemption consisted of a reduction to the base rate, 0.2¢, and reflects the fact that about 70% of all radio retransmissions fall within the 150-mile zone.24 In addition, RIAA agreed to a further reduction to compensate Yahoo! for any "competitive disadvantage" it faced if commercial broadcasters were found to be totally exempt from the digital performance right under a separate

exemption.25

The Panel, however, did not credit RIAA's explanation and concluded that this concern over the exemptions, especially the 150-mile exemption, had no bearing on Yahoo!'s negotiations. The Panel steadfastly maintained throughout its report that Yahoo!'s only aim in the negotiation process was to achieve a rate that translated into an acceptable overall level of payment, and that it did not concern itself with the legal consequences of the 150-mile exemption. Report at 66-67. Thus, the Panel characterized RIAA's arguments in regard to the 150-mile exemption to be nothing more than a "red herring" and without effect in the negotiation process. Id. at 85. Consequently, the Panel found that Yahoo! willingly granted RIAA's request for the "whereas clause," relating to the transmissions within the 150-mile radius, because it

<sup>23</sup> Section 114(d)(1)(B)(i) of the Copyright Act provides an exemption from the digital performance right for "a retransmission of a nonsubscription broadcast transmission: Provided, That in the case of a retransmission of a radio station's broadcast transmission—(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter.'

<sup>24</sup> At the insistence of RIAA, the Yahoo! agreement includes a "whereas" clause which states that approximately 70 percent of Yahoo!'s radio retransmissions are within a 150-mile radius of the originating radio station.

<sup>25</sup> Section 114(d)(1)(A) exempts a "nonsubscription broadcast transmission." Following a lengthy rulemaking proceeding to determine the scope of this exemption, the Copyright Office concluded that the exemption applies only to over-the-air broadcast transmissions and does not include radio retransmissions made over the Internet. 65 FR 77292, December 11, 2000. This decision was upheld when challenged in the United States District Court for the Eastern District of Pennsylvania. See Bonneville Int'l, et al. v. Peters, 153 Supp. 2d 763 (E.D. Pa. 2001). The case is now on appeal to the United States Court of Appeals, Third Circuit.

However, during the negotiation period and prior to the Copyright Office's rulemaking decision and the court's decision, Yahoo! had argued that it would be at a competitive disadvantage if the courts adopted the broadcasters interpretation of section 114(d)(1)(A) and found all transmissions made by FCC-licensed broadcasters (those made over-the-air and those made over the Internet) to be exempt from the digital performance right.

cost Yahoo! nothing. Yahoo!'s perception of the clause, however, did not alter the significance of the "whereas clause" to RIAA, who wanted the provision included in the agreement because it would allow RIAA to argue before this CARP that the 0.05¢ rate for radio retransmissions represents a real rate of 0.2¢, which was discounted to account for the legal uncertainties at the time of the negotiation. Report at 67.

Webcasters had problems with the Panel's analysis, too. It found fault with the Panel's approach to setting rates for webcasting based on the rates in the Yahoo! agreement. Webcasters object to the methodology used by the Panel in calculating the proposed rates, especially the use of an inflated rate as a starting point for setting the rates for IO transmissions. Moreover, they contest the use of any rate for IO transmissions contained in the Yahoo! agreement because Yahoo! had less interest in negotiating a favorable rate for these transmissions, which constituted only 10% of its business. Webcasters Petition at 30-40. Instead, Webcasters argue that Yahoo! agreed to the 0.2¢ rate for IO transmissions only because it obtained a significantly lower rate for its radio retransmissions, and that any number of possible combinations of rates could have been set to achieve Yahoo!'s targeted rate. Because of this, Webcasters argue that the endpoints settled upon in the agreement were patently arbitrary. The Register concurs with the Webcasters' analysis on this point and finds that the Panel's use of the IO rate was arbitrary because of the IO rate, which, in and of itself, did not reflect what the willing buyers and willing sellers had agreed to in the Yahoo! deal.

Another flaw in the Panel's reasoning, according to Webcasters, was its reliance on the  $0.083 \, \text{¢}$  "blended rate" as the lower end of the acceptable range of IO rates. They argue that this rate should not even be considered because it was never negotiated as a performance rate at all. This observation, however, overlooks the fact that Yahoo! actually paid this rate for 1.5 billion performances without regard to the nature of the performances. The fact that the rate was not negotiated as a separate rate for Internet-only transmissions does not diminish its usefulness for purposes of this proceeding. As the Panel asserted throughout this proceeding, it is hard to find better evidence of marketplace value than the price actually paid by a willing buyer in the marketplace.

The question, however, is whether the rates in the Yahoo! agreement represent distinct valuations of Internet-only transmissions and radio

retransmissions. Ultimately, the Register concludes that they do not and. therefore, the Panel's reliance on these specific rates for IO transmissions and radio retransmissions as a tool for setting the statutory rates is arbitrary. The fundamental flaw in the Panel's analysis, though, is not its acceptance of the Yahoo! agreement as a starting point. Rather, it is the Panel's determination that the differential rate structure reflects a true distinction in value between Internet-only transmissions and radio retransmissions based upon the promotional value to the record companies and performers due to airplay of their music by local radio stations. The Panel reached this conclusion in spite of the fact that nothing in the record indicates that the parties considered the promotional value of radio retransmissions over the Internet when they negotiated these

RIAA maintains, and the Broadcasters concur, that no evidence exists to support the Panel's determination that Yahoo! and RIAA considered and made adjustments for the promotional value of radio retransmissions. RIAA Reply at 48; Broadcasters Petition at 39. In fact, the Broadcasters argue that it was "'patently' arbitrary for the Panel to conclude that promotional value was a "likely influence" on Yahoo!'s RR rate when the record evidence showed that neither party had ever suggested anything of the kind." Broadcasters Petition at 39. The Register agrees and finds that the Panel's reliance on promotional value to justify the price differential for IO transmissions and radio retransmissions was arbitrary. The Panel's speculative conclusion that "this factor was likely considered by RIAA and Yahoo!, and is evidently reflected in the resulting difference between RR and IO negotiated rates," only serves to undermine the validity of the Panel's final analysis on this point.

See Report at 75. Moreover, the Panel's own earlier findings with regard to the studies offered to show that the Internet has a promotional effect contradicts its later finding concerning the promotional effect derived from radio retransmissions over the Internet. After considering the two studies offered into evidence by the Services, the Panel categorically stated that it "could not conclude with any confidence whether any webcasting service causes a net substitution or net promotion of the sales of phonorecords, or in any way significantly affects the copyright owners' revenue streams." Report at 33— 34. It noted that "the Soundata survey presented by Mr. Fine evinced a net

promotional effect of radio broadcasts, but said little about the net promotional effect of the Internet—and nothing about the net promotional effect of webcasting." Id. at 33. It went on to say that "for the time period this CARP is addressing, the net impact of Internet webcasting on record sales is indeterminate. Id. at 34. These observations do not support a conclusion that radio retransmissions have a greater impact than IO transmissions on record sales or that either form of transmission has any impact on record sales.

However, the CARP did conclude that "to the extent promotional value influences the rates that willing buyers and willing sellers would agree to, it will be reflected in the agreements that result from those negotiations." Id. But therein lies the problem. As discussed above, RIAA and Yahoo! did not consider promotional value when negotiating the Yahoo! agreement, therefore, its effect cannot be reflected in the IO and RR rates set forth in the

Yahoo! agreement. However, rejection of the CARP's conclusion on this point does not nullify the usefulness of the Yahoo! agreement. The Register accepts the Panel's determination that the Yahoo! agreement yields valuable information about the marketplace rate for transmissions of sound recordings over the Internet, and is a suitable benchmark for setting rates for all the reasons discussed in section IV.3, supra. Moreover, a careful review of the record support's the Panel's further finding that in effect, the real agreement between Yahoo! and RIAA was for a single, unitary rate for the digital performance of a sound recording and not the two separate rates set forth in the agreement-rates, which the Panel found were artificially high (for IO

transmissions) and low (for RR). The Register accepts the CARP's conclusion that the differential rate structure was developed to effectuate particular objectives of the parties, distinct and apart from establishing an actual valuation of the performances. Specifically, the Panel found that RIAA obtained an artificially high IO rate in an attempt to protect its targeted valuation of IO transmissions for use in this proceeding and Yahoo! received an "effective rate" it could accept. Because the record evidence supports this finding, Report at 65, referring to Tr. 11256-57; 11281 (Mandelbrot); Panel Rebuttal Hearing Exhibit 1 at 4; Tr. 11279-81, 11395-96 (Mandelbrot); Tr. 10237-38 (Marks), it was not arbitrary for the Panel to reach this conclusion. Report at 64-65 (noting that "Yahoo!'s

primary concern, as characterized by its negotiator, was to negotiate a license agreement under which it would pay 'the lowest amount possible', that "Yahoo! was willing to accept a higher IO rate in exchange for a lower RR rate in order to achieve the lowest overall effective rate for all its transmissions' (emphasis added), and that Yahoo! was pleased to achieve the lowest possible overall rate."); (noting that "the bottom line" combined rate was of paramount importance to Yahoo!). Report at 74. Moreover, Yahoo! maintains that it would not have paid the 0.2 cent rate for the IO transmissions but for the rate it received for radio retransmissions because the two rates, when considered together, yielded an acceptable "effective rate" for all transmissions. The testimony of David Mandelbrot, the Yahoo! representative, is particularly informative on this point.

Question: When you entered into the agreement with the RIAA, just looking at the 0.2 cents per performance rate for Internet-only broadcasting, you didn't consider that an unfair rate, did you?

Answer: Mandelbrot: We considered it a higher rate than we would have paid if we were just negotiating an Internetonly rate. I would say we did not consider it an unfair rate in the totality of the entire agreement, which was that we were getting the 0.05 cent rate for the radio retransmissions.

Mandelbrot Tr. at 11347-11348. This statement supports a finding that Yahoo!, the willing buyer in this case, did not accept the stated IO rate as an accurate reflection of what it would be willing to pay for the right to make

those transmissions.

There is also scant evidence to indicate that Yahoo! gave any serious consideration to the effect of the 150mile exemption for certain radio retransmissions when negotiating the IO and RR rates. Mandelbrot maintained that the exemptions were of little significance to Yahoo!, since it was "looking to use whatever [it] could to get as low a rate as possible." Id. at 11381; see also 11331 (Mandelbrot admits using the ambiguities in the law, even though they thought the arguments in their favor were weak, solely for the purpose of getting "an effective rate that we could live with"). Again it is clear that Yahoo!'s focus was the negotiation of a rate at the lowest possible level that would allow it to conduct business without concerns about copyright violations.

Where such determinations are based on the testimony and evidence found in the record, the Register and the Librarian must accept the Panel's weighing of the evidence and its

determination regarding the credibility of a witness. Likewise, the Register and the Librarian may not question findings and conclusions that proceed directly from the arbitrators' consideration of factual evidence in the record. In this instance, the Panel credited Mandelbrot's testimony and his characterization of the negotiation process, specifically concluding that his testimony was credible, and that Yahoo! understood the argument based on the 150-mile exemption had no significant impact on the rates ultimately negotiated.26 Report at 67. Consequently, we must accept the Panel's assessment on this point, which leads to the conclusion that the "effective rate" achieved through the unique rate structure represents the value these parties placed on the performance of a sound recording, without regard to origin of or the entity making the transmission.

Based upon a modification to the Panel's approach for calculating rates for making transmissions of sound recordings under statutory license that accepts as much of the Panel's reasoning as possible, the base rate for each performance is 0.07¢ (rounded to the nearest hundredth). The methodology for calculating this rate is presented and discussed in full in section IV.8.

Are Rates Based on the Yahoo! Agreement Indicative of Marketplace Rates?

Many webcasters, including Live365, maintain that the proposed rates derived from the Yahoo! rates do not reflect what a willing buyer would pay in the marketplace for the right to make these transmissions. Live365 maintains that the Panel incorrectly analyzed the evidence in the record. First, it notes that the Panel itself found that many of the rates in the voluntary agreements

were prohibitively high, including a revenue-based royalty set at 15% of a webcaster's gross revenue. Live 365 Petition at 16. It then argues that it was arbitrary for the Panel to make this finding and then propose rates that exceed the rates it deemed to be excessive, and more than the market could bear. Id. To make its point, Live365 uses the Panel's per performance rate and calculates how much certain services would pay for the digital performance right and translates that amount into a percentage of revenue metric. In each of the cited examples, the amount to be paid based on the proposed per performance rate (as expressed as a percentage of revenues) is considerably higher than that that would be required under any of the percentage-of-revenue models proposed by any party at any time. For example, under the Panel's proposed rates, one service would purportedly pay 21% of its gross revenue, a figure which is considerably higher than the 15% of gross revenues contained in many of the voluntary agreements ultimately rejected by the Panel. Based on this observation, Live365 contends that the Panel's proposal runs counter to the evidence and, therefore, it is arbitrary. Id. at 18.

Moreover, Live365 argues that the Panel failed to account for relevant market factors, including how much a webcaster can pay. Id. at 19. Webcasters voice similar concerns, arguing that the adoption of a per performance rate will cause ruin to many webcasters who to date have yet to generate a viable income stream. Webcasters Petition at 60. In place of this structure, webcasters assert that a percentage-of-revenue model must be adopted in order to address the economic situation facing small, independent webcasters. They maintain that those Services that entered into voluntary agreements based on a percentage-of-revenue will remain in business while those operating under the statutory license with its per performance royalties will not. Webcasters Petition at 62–63. In the eyes of the Webcasters, such a result reflects unexplained disparate treatment of similarly situated parties, and requires an adjustment to eliminate this unjust and arbitrary result. Webcasters also argue that the Panel failed to articulate a rational basis for failing to offer an alternative rate structure based on percentage-of-revenue.

In addition, Live365 argues, as do the Broadcasters, that Yahoo! is a substantially different type of business from small start-up webcasters who would be unwilling to pay the same rates as Yahoo! for the use of sound

<sup>&</sup>lt;sup>26</sup> The Register finds that RIAA's explanation for the rate structure is equally plausible. Certainly, at the time the Yahoo! agreement was being negotiated, the application of the general exemption for a nonsubscription broadcast transmission, 17 U.S.C. 114(d)(1)(A), and the more specialized exemption for radio retransmissions within 150 miles of the radio broadcast transmitter, 17 U.S.C. 114 (d)(1)(B)(I), was in dispute. Thus, it would have been totally rational for the parties to fashion a rate structure that accounted for possibly exempt transmissions. It would have been logical to achieve this end by discounting the unitary rate to reflect the number of exempt transmissions which, in this case, was approximately 70% of all the radio retransmissions.

However, it is not for the Register or the Librarian to choose between two equally plausible explanations of the facts. The law requires that the Librarian accept the Panel's determination unless its conclusions are unsupported by the record. Thus, having found record support for the Panel's conclusion that the 150-mile exemption played no role in the final determination of the negotiated rates, we must accept its finding on this point.

recordings. Thus, it contends that the Yahoo! rates do not reflect what these buyers would be willing to pay in the marketplace. The implication is that these businesses have expended significant monies on start-up costs, including software, infrastructure development, and bandwidth, and having not yet established substantial revenue streams would be unable or unwilling to pay the same rates. Live 365 Petition at 7, 11. Moreover, Live365 argues that the rates set by the Panel thwart Congressional intent "by making Internet performances of sound recordings economically unviable for many webcasters." Live365 Petition at 21.

RIAA takes exception with the Webcasters and Live365 on these issues. It analyzes how much certain webcasters and Live365 pay, as a percentage-of-revenue, for sales and marketing cost, personnel cost and bandwidth. The results show that a company's costs for these services can amount to more than 100 times the amount of a company's revenue, whereas the projected costs of the royalties for transmitting sound recordings for the same time period are no more than 2 times the amount of a company's revenue. RIAA Reply at 57. In all cases, these costs reflect the start up nature of the industry, and not the ultimate make or break point of the business. Thus, a proposed fee that results in royalty payments above the current revenue stream for a webcaster is not atypical or unexpected. Certainly, if that were the measure of the value of these services, then the costs for employment, hardware, and marketing-so essential to establishing and maintaining the business-must also be viewed as excessive and above the fair market value for each of these services. Clearly, that is not the case, nor can one rationally conclude that it should be the case.

Moreover, RIAA notes that the courts have historically upheld rates set by the CRT, even when users have argued that the rates would cause the business to cease certain operations. Where the intent of Congress is to set a rate at fair market value, as in this proceeding, the Panel is not required to consider potential failure of those businesses that cannot compete in the marketplace. See National Cable Television Ass'n. v. CRT, 724 F.2d 176 (D.C. Cir. 1983) (holding that rates set at fair market value were proper even though cable operators argued that the rates were prohibitively high and would cause them to cease transmission of the distant signals at issue.).

The law requires only that the Panel set rates that would have been negotiated in the marketplace between a willing buyer and a willing seller. It is silent on what effect these rates should have on particular individual services who wish to operate under the license. Thus, the Panel had no obligation to consider the financial health of any particular service when it proposed the rates. It only needed to assure itself that the benchmarks it adopted were indicative of marketplace rates.

7. Should a Different Rate be Established for Commercial Broadcasters Streaming Their Own AM/ FM Programming?

Although RIAA had argued that the rate for commercial broadcasters should be the same as the rate for Internet-only webcasters, the Panel did not agree. It did agree, however, that the rate for commercial broadcasters should be the same as the rate adopted for radio retransmissions and that these rates should be based on the Yahoo! agreement.

It noted that the Yahoo! agreement established rates for retransmissions of the same types of radio station signals as those directly streamed by commercial broadcasters. Consequently, it put the burden of proof on the broadcasters to present evidence to distinguish between the direct transmission of their programs over the Internet and the retransmission of the same programming made by a thirdparty. Broadcasters were unable to offer any compelling evidence on this point. Thus, in the end, the Panel was unable to distinguish between commercial broadcasters and radio retransmisions, stating that "the record was utterly devoid of evidence implying a higher rate [for commercial broadcasters] and insufficient [evidence] to warrant a lower rate." Report at 84-85. (emphasis in the original).

Nevertheless, Broadcasters are troubled by the Panel's use of the Yahoo! agreement to set rates for broadcasters for two main reasons. First, they argue that Yahoo! represents a substantially different type of business. Second, they maintain that the Panel must make affirmative findings that the businesses are comparable before applying the same rates to both Services. Broadcasters Petition at 26–27.

Indeed, Yahoo! offers a plethora of services, making available hundreds of radio stations, local television stations, video networks, concerts, CD listening programs, Internet-only music channels and educational and entertainment video programs. Id. at 28. Nevertheless, an examination of the record clearly

shows that both business models are fundamentally comparable in at least one all-important way: they simulcast AM/FM programs over the Internet to anyone anywhere in the world who chooses to listen. Even accepting the fact that Broadcasters say their fundamental business is to provide programming to their local audiences, the potential for reaching a wider audience cannot be denied. Given that the record indicates that 70% of Yahoo!'s radio retransmissions are to listeners within 150 miles of the originating radio station's transmitter, Yahoo!'s business with respect to radio retransmissions seems to be very similar. Moreover, the fact that Yahoo! offers many additional services is not relevant to this proceeding because the Yahoo! agreement only addressed the rates Yahoo! paid for streaming sound recordings over the Internet. Had the contract been tied to other services offered by Yahoo!, it might well have been inappropriate to use this contract in this context. That is not the case and so it was not arbitrary for the Panel to rely on the Yahoo! contract to set the rate for broadcasters who stream their own programming over the Internet.

Commercial broadcasters then take another approach and argue that they never would have agreed to the rates that Yahoo! paid because their purposes for streaming differ from Yahoo!'s purposes. Commercial broadcasters assert that they began streaming in order to have a presence "in the online world, to maintain the local radio brand, and as a convenience to their regular overthe-air listeners." Broadcasters Petition at 29. They then note that many commercial broadcasters have already ceased streaming because of an increase in costs. They cite this fact as evidence of their assertion that they would only be willing to pay a significantly lower rate than a third-party aggregator like Yahoo! See Broadcasters Petition at 31. fn 25 (offering examples of decisions made by radio stations to cease their streaming operations because of bandwidth fees and dispute over royalty fees between AFTRA and the advertising agencies). They also cite the testimony of David Mandelbrot, who testified that Yahoo! feared broadcasters would be unwilling to absorb the rates Yahoo! negotiated for streaming AM/FM programming. Id. at 32. Based upon this evidence, the Broadcasters and Live365 conclude that the Panel acted in an arbitrary manner in setting the rates that will put many services out of business. Live365 Petition at 15, 18.

However, the Panel did consider the differences between the two business models, speculating that it was entirely possible that the cost to stream AM/FM programming would be lower for broadcasters than for third-party aggregators like Yahoo! Id. at 84-85. Had Broadcasters made that argument or similar ones to show that Yahoo! received greater value from its streaming activities, the Panel may well have set a lower rate for Broadcasters who stream their own programming. Id. at 85. But as the Panel observed, it cannot make adjustments based on mere speculation. So when the Panel found no record evidence to distinguish these services, it had no reason to offer a separate rate for commercial broadcasters who stream their own AM/FM signal over the Internet. Id. at 84.

Moreover, RIAA points out that Yahoo! never even tried to pass along the costs of the transmissions to the radio stations. Thus, no determination could be made as to whether the broadcasters would have accepted the rate and paid it, or rejected it out of hand. RIAA Reply at 45. RIAA's observation is persuasive, as is the Panel's general observation that the record did not contain any evidence to support a different rate for commercial broadcasters. Thus, the Panel's decision not to set a different rate for commercial broadcasters was not arbitrary.

For these reasons, the Register accepts the Panel's decision not to differentiate between simulcasts made by commercial broadcasters and simulcasts of the same programming made by a third-party aggregator. Accordingly, the rate for commercial broadcasters streaming their over-the-air radio programs on the Internet is the unitary rate gleaned from the Yahoo! agreement.

#### 8. Methodology for Calculating the Statutory Rates for the Webcasting License

a. Calculation of the unitary rate. In section IV.5, the Register rejected the Panel's determination that the Yahoo! agreement provided a basis for establishing different rates for Internetonly transmissions and radio retransmissions. Instead, a determination was made that the Yahoo! agreement justified only a single rate applicable to all transmissions, without regard to the source of the transmission. To calculate this unitary rate, it is necessary to determine what Yahoo! paid for the initial 1.5 billion performances, based on the lump sum payment, and what it expected to pay for transmissions after that time.

The first calculation was actually done by the Panel based upon Yahoo!'s agreement to pay RIAA \$1.25 million for the first 1.5 billion transmissions made by Yahoo!. It divided the amount paid

by the number of performances (\$1.25 million/1.5 billion performances) to get a "blended" rate of 0.083¢ per performance. Report at 63. To determine the "effective rate" for the second period, a calculation must be made to account for the differential IO and RR rates, 0.2¢ and 0.05¢, respectively, set forth in the agreement and the relative proportion of Internet-only transmissions to radio retransmissions. This is a simple arithmetic calculation and one that Yahoo! had already performed in order to gauge the actual costs of the performances under the differentiated rate structure. This calculation yielded an "effective" or "blended" rate of 0.065¢ per performance based upon Yahoo!'s expectation that 90% of its transmissions would continue to be radio retransmissions with the remaining 10% being Internet-only transmissions  $[((9 \times 0.05 x) + (1 \times 0.2 x))/$ 10]. Report at 63, citing Tr. 11279, 11292 (Mandelbrot), Panel Rebuttal Hearing Exhibit 1 at 7.

Now the question is how to reconcile these values to determine the unitary rate. Although an argument can be made for adopting either value, it makes more sense to use both values and take the average of the two. In this way, the final unitary rate captures the actual value of the performances made in the initial period (for which Yahoo! paid a lump sum for the first 1.5 billion performances) and the projected value of the transmissions at the agreed upon rates for the remainder of the license period; and it falls within the range of acknowledged values of these transmissions. Courts have long acknowledged that rate setting is not an exact science, and all that is necessary is that the rates lie within a "zone of reasonableness." See National Cable Television Assoc. Inc. v. CRT, 724 F.2d 176, 182 (D.C. Cir. 1983) ("Ratemaking generally "is an intensely practical affair. The Tribunal's work particularly, in both ratemaking and royalty distributions, necessarily involves estimates and approximations. There has never been any pretense that the CRT's rulings rest on precise mathematical calculations; it suffices that they lie within a "zone of reasonableness""). Thus, the record here supports a "zone of reasonableness" between 0.083¢ and 0.065¢.

Accordingly, the Register recommends that the rate for making an eligible nonsubscription transmission of a sound recording over the Internet under section 114 be set at 0.07 cents per performance, per listener, the midpoint of the "zone of reasonableness."

Determination of this rate, however, is not necessarily the end of the ratesetting process. Webcasters had argued for a downward adjustment to the rates proposed by the Panel to compensate for litigation cost savings and added value due to MFN clause. Such arguments apply with equal force to the unitary rate proposed by the Register. Webcasters Petition at 42-43. The Webcasters' argument is well taken and, based on the record evidence, it is reasonable to assume that the rates in the Yahoo! agreement are slightly higher to account for these two factors. See Report at 68-69. However, there is a problem in making an adjustment to the proposed rate where the record contains no information quantifying the added value of the factors that purportedly resulted in inflated rates. See Report at 29 (discussing lack of record evidence quantifying value of any factor, other than promotional value, that allegedly influenced the negotiated rates). The potential (but apparently unquantifiable) added value attributable to these 2 factors might present a problem if the Register were proposing a rate at the high end of the 0.065¢-0.083¢ range, but because the Register is recommending a rate in middle of the "zone of reasonableness," it is safe to conclude that the recommended rate falls into that zone of reasonableness even taking these factors into account.

Similarly, Broadcasters argued for a downward adjustment of the simulcast rate to account for the promotional value associated with over-the-air broadcasts. Broadcasters Petition at 41. The record, however, does not support this suggestion. Indeed, the Panel did acknowledge that over-the-air radio retransmissions had promotional value, but it concluded that "the net impact of Internet webcasting on record sales is indeterminate." Report at 34. This is not to say that webcasting, including simulcasting of over-the-air radio programming, has no promotional value. It only means that the record companies gain similar benefits from both types of transmissions. Consequently, no adjustment is necessary.

b. The 150-mile exemption. Under section 114(d)(1)(B)(I), any retransmission of a nonsubscription broadcast transmission is exempt, as a matter of law, from the digital performance right, provided that "the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter." During the course of the negotiations between RIAA and Yahoo!, there was a great deal of uncertainty regarding this

provision and whether it applied to transmissions made over the Internet. See discussion above, section IV.a.5.

As noted above (section IV.a.5.), in its Petition, RIAA argued that during the course of the negotiations between RIAA and Yahoo!, there was a great deal of uncertainly regarding this provision and whether it applied to transmissions made over the Internet. RIAA argued that because of this uncertainty, it had been willing to agree to a lower radio retransmission rate. In fact, RIAA pointed out that its chief negotiator had advised its negotiating committee that RIAA's arguments against application of the 150-mile exemption to a retransmitter such as Yahoo! "are not particularly strong." RIAA Petition at 20.

Confronted with the assertions made in RIAA's petition which indicated that RIAA itself had had considerable doubts on the subject at the time of the negotiations, the Register felt compelled to determine whether radio retransmissions over the Internet to recipients within 150 miles of the radio transmitter are, in fact, eligible for the section 114(d)(1)(B) exemption.27 The Register issued an order on June 5, 2002, asking the parties to brief two legal questions concerning the 150-mile exemption. The first question asked whether a retransmission over the Internet of a radio station's broadcast transmission to a recipient located within 150 miles of the site of the radio broadcast transmitter is an exempt transmission pursuant to 17 U.S.C. 114(d)(1)(B). The second question then queried whether the exemption would still apply to radio retransmissions made within the 150-mile radius by a Licensee, in the case where that same service is simultaneously retransmitting the radio station's broadcast transmission of one or more recipients, located more than 150 miles from the site of the radio broadcaster's transmitter.

Section 114 could be read as allowing a Licensee to take advantage of the exemption for all Internet retransmissions of a radio broadcast to recipients within a 150 mile radius of that radio station's transmitter. The statutory language, however, does not make clear whether that same Licensee would retain the benefit of the exemption for those transmissions if additional retransmissions of the radio broadcast signal were also made "willfully" or "repeatedly" outside the 150-mile radius.

A critical piece in the analysis is the meaning of the word "retransmission." Each retransmission of a radio signal over the Internet may be viewed as a discrete, point-to-point transaction to be considered on its own merit without reference to further retransmissions made by the Licensee. Alternatively, the reference to "willful and repeated" may require consideration of each retransmissions, made by the Licensee to multiple listeners over a period of time, both inside and outside the 150-mile radius.

Having considered the parties' responses, the statutory language and its relationship to section 112, the Register now concludes that the exemption is not applicable to radio retransmissions made over the Internet. While Copyright Owners and Performers offer many arguments in support of their position that radio retransmissions within 150 miles of the radio station's transmitter are not exempt, and while Broadcasters offer many arguments to the contrary, the critical piece of the analysis—and the argument that the Register finds persuasive—is found in the text of section 112(e). This section provides a statutory license for making ephemeral recordings only to "a transmitting organization entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv) or under a statutory license in accordance with section 114(f)." 17 U.S.C. 112(e)(1).

The statutory license for ephemeral recordings in section 112(e) was enacted as part of the same section of the DMCA-section 104-that expanded the section 114 statutory license to include webcasting. The purpose of this ephemeral recording statutory license was to enable business establishment services and services using the new section 114 statutory license for webcasting to make the ephemeral recordings they need to make in order to facilitate their licensed transmissions, and in recognition of the fact that the exemption in section 112(a) permitting the making of a single ephemeral recording might not be adequate. See H.R. Rep. 105-796, at 89-90.

Congress expressly provided in the DMCA amendments that business establishment services operating under

the section 114(d)(1)(C)(iv) exemption are eligible for the section 112(e) statutory license for ephemeral recordings in order to facilitate Internet transmissions by business transmission services. Congress's failure to do the same for services operating under the section 114(d)(1)(B) exemption demonstrates that Congress did not contemplate that that exemption would be available to services making retransmissions via the Internet.

Moreover, if section 114(d)(1)(B) were interpreted as providing an exemption for a radio retransmission over the Internet, when that retransmission is to a recipient located within 150 miles of the radio station's transmitter, the Licensee could not make ephemeral recordings to facilitate such an exempt retransmission. This interpretation would put the Licensee in the illogical position of having a right to retransmit the radio signal, but no means of accomplishing the retransmission without negotiating private licenses to make ephemeral recordings to facilitate the exempt transmissions. At the same time, the Licensee could operate under a statutory license for making the ephemeral recordings to facilitate its non-exempt transmissions beyond the 150-mile radius made pursuant to the section 114(f) statutory license. As RIAA points out in its response to the June 5 Order: "Such a result is inconsistent with one of the purposes of the DMCA statutory licenses to create efficient licensing mechanisms for copyright owners and webcasters," citing H.R. Rep. 105-796, at 79-80 (1998). Consequently, the better interpretation of the section 114(d)(1)(B) exemption is to consider all retransmissions of a License in the aggregate, which logically means that no Internet retransmissions are exempt under section 114(d)(1)(B).

Based on the interplay between sections 112 and 114, the better interpretation of the law is that the exemption does not apply to radio retransmissions made over the Internet.<sup>28</sup>

<sup>&</sup>lt;sup>27</sup> If the Register had concluded that Internet retransmissions to recipients located within the 150-mile radius are exempt, she most likely would have recommended an adjustment of the 0.07¢ per performance rate as applied to radio retransmissions to take into account the record evidence that approximately 70% of radio retransmissions are to recipients located within 150 miles of the radio transmitter. The result would have been a radio retransmission rate of .02¢ per performance, and correspondingly lower rates for radio retransmissions by non-CPB, noncommercial broadcasters.

<sup>&</sup>lt;sup>28</sup> Copyright Owners argue that the Copyright Office had already decided this issue twice before: (1) In its decision in a rulemaking announced December 11, 2000 that transmissions of a broadcast signal over a digital communications network, such as the Internet, are not exempt from copyright liability under section 114(d)(1)(A), Public Performance of Sound Recordings: Definition of a Service, 65 FR 77292; and (2) in an Order issued July 16, 2001, in which the Office stated that the "Panel must use the "willing seller/willing buyer" standard to set rates for all non-interactive nonsubscription transmissions made under the section 114 license, including those within 150 miles of the broadcaster's transmitter." (Emphasis added.) The Register made no such decision on either occasion

9. Rates for Other Webcasting Services and Programming

a. Business to business webcasting services. Some Services provide specialized Internet radio-like stations to businesses rather than directly to consumers. These business-to-business webcasting services (B2B) are in many respects analogous to business establishment music services 29 and can provide programming customized to the demographics of the customers of a particular business. Report at 78. For this reason, RIAA had proposed setting a higher rate for business to business webcasting services than for business to consumer (B2C) services. The Panel, however, rejected this suggestion, finding that the evidence did not support a higher rate for B2B services. It found that most of the agreements for such services had rates near or below the predominant rate set for standard Internet-only transmissions. Report at 79. Thus, the Panel concluded that it had "found insufficient evidence to support a separate rate for syndicator services", and set the rate accordingly at 0.14¢ per performance, just as it had for Internet-only performances. Id.

RIAA argues for a premium rate for these Services, because they syndicate their programming through third-party non-entertainment websites. RIAA maintains that these transmissions are outside the scope of the webcasting license, and consequently, services should pay a premium when they make transmissions through non-entertainment websites. RIAA Petition at 50–52. In response, Webcasters argue

The scope of section 114(d)(1)(B) was not at issue in the December 2000 rulemaking on the status of broadcasters. Likewise, the July 16 Order was in response to Copyright Owners' Motion for Declaratory Ruling Concerning Statutory Standard, in which Copyright Owners argued that one of the Services' witnesses was "in effect" arguing for "an exemption for AM/FM Webcasts within the 150mile area." However, the testimony in question actually was arguing only that in determining the radio retransmission rate, the CARP should take into account that no royalty is payable on non-Internet radio retransmissions within the 150-mile radius because of the promotional value those retransmissions have on record sales. The witness asserted that because "local distribution of exactly the same material via the Internet has identical economic effects," the Panel should exclude from its calculations "recipients of those transmissions who lie within 150 miles of the station's transmitter." Fisher Testimony at ¶ 52. In their opposition to the motion, the Services made no argument that Internet retransmissions are exempt under section 114(d)(1)(B), and the Office made no ruling with respect to the exemption. Thus, until the responses to the June 5, 2002 order were filed the issue had never been joined, much less decided, on whether radio retransmissions within the 150mile radius are exempt, and the issue had never been decided.

<sup>29</sup> See footnote 6, supra, for a description of a Business Establishment Service.

that the "value of the performance does not change merely because of the technology of the webcaster or the fact that the sound recording is heard when it is accessed at a third-party website rather than the originating webcaster's website." Webcasters Reply at 57. Moreover, they maintain that RIAA offered no evidence to demonstrate that these transmissions should be valued at a higher rate. In fact, the record indicates the opposite. Most of the RIAA voluntary agreements which permit the licensee to distribute its webcasts to third-party websites contain no premium for this practice. Id. at 59.

Thus, based on the weight of the evidence, it was not arbitrary for the Panel to conclude that a separate rate should not be set for syndication services. The Panel is responsible for weighing the evidence and so long as the record supports its decision, the Register will not second-guess the Panel's finding of fact. Nevertheless, this determination does not end the inquiry. RIAA correctly cites section 114(j)(6) of the Copyright Act for the proposition that an eligible nonsubscription transmission does not include those made by a service whose primary purpose is to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events. Thus, in any given case a determination would have to be made to ascertain whether such transmissions are covered under the statutory license. This proceeding, however, is not the appropriate vehicle for such a factspecific determination. If a court determines that the transmissions made by a particular business-to-business service fall outside the scope of the webcasting license, then those transmissions are acts of copyright infringement unless the service obtains licenses from the copyright owners. In such cases, an infringement action would be the appropriate course of action, rather than the imposition of a premium rate for such transmissions as suggested by RIAA. No rate—premium or otherwise—can be set for a transmission that does not comply with the terms of the license.

b. Listener-influenced services. There was also much discussion about listener-influenced services that allow the listener some control over the programming through on-line ratings and skip-through features. RIAA's position first and foremost is that these services do not qualify for the webcasting license. However, RIAA also proposed a much higher rate for these services in the event the Panel discerned a need to set a separate rate

for these services. Again, the Panel found no record support for setting a separate and higher rate for listenerinfluenced services. It rejected the agreements between RIAA and non-DMCA compliant services because the rates in those agreements were for rights beyond those granted under the statutory license. Nor could the Panel discern from the record evidence which services would be subject to the basic webcasting rate as distinguished from the rate for listener-influenced services. Consequently, the Panel decided "that so long as a service complies with, and is deemed eligible for the statutory license, it should not pay a separate rate based upon listener influence." Report

The Register finds the Panel's analysis to be consistent with the law, and thus accepts the Panel's decision not to set a separate rate for transmissions which might not come within the scope of the license. Again, if transmissions made by a listener-influenced service are determined to be outside the scope of the statutory license, the proper course of action would be for the parties to negotiate a voluntary agreement for these transmissions, or for the copyright owner to file a copyright infringement suit against the service. The Panel has no authority to propose a rate for any transmission which cannot be made lawfully under the statutory license.

c. Other types of transmissions. A broadcaster may stream three different types of programming in addition to a simulcast of its AM/FM radio signal: (1) "Archived" (previously aired) radio programming; (2) "side channels" (Internet-only programming); and (3) "substituted programming" (programming that replaces over-the-air programming that has not been licensed for simulcast over the Internet). The question for the Panel was whether such programming is the same or substantially similar to radio retransmissions or Internet-only programming.

In making its decision, the Panel first considered the definition of a "radio retransmission performance." It found that the record failed to provide a coherent and workable definition, rejecting both the definition set forth in the Yahoo! agreement and the one that was included in the defunct settlement agreement between RIAA and the commercial broadcasters. Instead, it adopted the definition of the term provided by Congress in the statute which defines the term as "a further transmission of an initial transmission \* \* if it is simultaneous with the initial transmission." See 17 U.S.C. 114(j)(12). Based on this definition, the

Panel concluded that a transmission made as part of archived programming, side channels or substituted programming was something other than a radio retransmission and, therefore, not entitled to the lower rate proposed for radio retransmissions. Instead, it agreed with RIAA that the programming was essentially the same as Internet-only programming, and without any record evidence to substantiate a different rate, should be subject to the 0.14¢ IO rate.

Broadcasters do not contest the Panel's determination with respect to side channels, and they recommend that the Librarian provide that the side channel rate be set at the webcaster rate expressly without prejudice to reconsideration in a subsequent CARP proceeding. Broadcasters Petition at 56. They do, however, object to the imposition of the rate for IO transmissions on the performances of sound recordings made during the transmission of an archived program or a substituted program. Id. at 55. Broadcasters' arguments no longer have any relevance under the statutory rate structure proposed by the Register, which proposes a single, unitary rate for all transmission. This fact in conjunction with the Panel's observation that the Yahoo! agreement did not differentiate or even recognize these alternative categories supports a determination that no separate rate should be set for these transmissions.

10. Rates for Transmissions Made by Non-CPB, Noncommercial Stations

National Public Radio ("NPR") and the National Religious Broadcasters Music License Committee ("NRBMLC") were the only two representatives of non-commercial stations participating in this proceeding. NPR reached a private settlement with the Copyright Owners during the proceeding and withdrew. In considering what the rate should be for the stations represented by NRBMLC and any other noncommercial station operating under the statutory license, the panel first considered past CARP decisions involving the statutory licenses. It found that a prior CARP had considered and distinguished commercial stations and noncommercial stations on the basis of their financial resources, noting that noncommercial stations depend upon funding from the government, business, and viewers, whereas commercial broadcasters generate a revenue stream through advertising. Report at 89, citing CARP report adopted by Librarian on September 18, 1998, Noncommercial **Education Broadcasting Rate** Adjustment Proceeding, 63 FR 49823.

Moreover, the earlier Panel determined that a rate set for a commercial station is an inappropriate benchmark to use when setting a rate for the same right for noncommercial stations because of these economic differences between these businesses. Specifically, it acknowledged that use of a rate set for a commercial broadcaster would overstate the market value of the performance for a noncommercial station.

Next, the Panel examined RIAA's approach, which focused on the amount the performing rights organizations ("PROs") were awarded in the 1998 Noncommercial Education Broadcasting Rate Adjustment Proceeding for use of their works by noncommercial stations. It adduced that they received 1/3 the amount of the fees paid by the commercial stations. Based on this precedent, RIAA offered the noncommercial stations a rate that corresponds to 1/3 the rate to be paid by commercial broadcasters.30 The Panel, finding no other evidence in the record to support a different rate, adopted the RIAA proposal for radio retransmissions, and proposed a rate of 0.02¢ per-performance (one-third of the 0.07¢ per performance rate, rounded to the nearest hundredth of a cent) for these transmissions only. Just as with the commercial broadcasters, the Panel found that archived programming subsequently transmitted over the Internet, transmissions of substituted programming, and transmissions of side channels constitute a transmission more akin to an Internet-only event. Consequently, it proposed a per performance rate for noncommercial broadcasters of 0.05¢ (one-third the rate paid by commercial broadcasters and webcasters for IO transmissions) for each sound recording included in these transmissions. This rate, however, is meant to apply only to the first two side channels-and not to additional side channels—in order to avoid the possibility of a noncommercial broadcaster gaining a competitive advantage over the commercial broadcasters and webcasters who

initiate Internet-only programs and do so at a higher cost.

Non-CBP broadcasters argue in their petition to set aside the CARP report, that the Panel failed to set the appropriate rates in two ways. They contend that the Panel ignored the record evidence which clearly established that the noncommercial stations are fundamentally different from commercial broadcasters and webcasters, and less viable economically, thus requiring the Panel to establish a lower rate for these stations. They also dispute, like the Webcasters and the commercial broadcasters, the Panel's decision to reject, as a benchmark, the amount of royalty fees these services pay for the use of the underlying musical works in an analog market under a separate compulsory license. Non-CPB Petition at 4. They then calculate a ratio between what a commercial broadcast station pays for use of the musical works in the analog world and what on average the non-CPB stations pay in the same market, based on an estimation of the number of stations, and the amount of royalties the stations paid for use of musical works in their over-the-air broadcasts. From these calculations, they suggest that a noncommercial broadcaster, on average, pays only 1/34th the amount of royalties that a commercial station pays for use of the same musical works and argue for a rate equal to 1/34th the amount that commercial broadcasters will pay. Alternatively, they request a flat rate of \$100 per station, see Non-CPB Noncommercial Broadcasters Reply Petition at 5, and argue that in no case should the rate exceed 1/3 the rate adopted for commercial broadcasters. Non-CPB, Noncommercial Broadcasters Petition at 9.

NRBMLC also turned to the rates for the statutory noncommercial broadcasting license and argued that the rates for the webcasting license should be based upon the rates currently paid to performing rights organizations for use of the musical works in over-the-air programs under this license. The Panel rejected this proposal on a number of grounds. First, it noted that those rates were the subject of prior settlements which stated that the negotiated rates for the noncommercial license were to have no precedential value for future rate setting proceedings for the noncommercial license. In light of this term, the Panel found the rates for the statutory noncommercial license had no relevance to the current proceeding. Not only were the rates for a totally different right, but they apparently have no precedential value for considering

<sup>&</sup>lt;sup>30</sup> RIAA stated that "the Noncommercial Broadcasters should pay the same royalty rates that apply to Webcasters and commercial broadcasters, which are based on a benchmark derived from marketplace agreements for the same and closely related rights." RIAA PFFCL concerning the Broadcaster Royalty Rate (Jan. 25, 2002) at ¶ 44; but see, Reply of Copyright Owners and Performers to Non-CPB Entities (Dec. 18, 2001) at 3 ("Copyright Owners are willing to accept a rate for Noncommercial Broadcasters that is no less than one-third of the rate paid for commercial broadcasters.").

future statutory noncommercial rates for use of the musical works. Report at 90. Second, the panel considered rates proposed by Dr. Murdoch, the expert witness for NPR, who at the request of the Panel made an attempt to identify an appropriate rate for noncommercial stations based on the fees currently paid to the PROs. Although she complied with the request of the Panel, she expressed severe reservations about her own conclusions, citing numerous problems with her own calculations. Report at 91. For these reasons, the Panel rejected Murdoch's proposed rates

RIAA supports the Panel's decision, noting that the non-CPB, noncommercial broadcasters failed to offer any differential rate for this type of service in its direct case or an expert witness who could support their ultimate request for a \$100 flat rate. The only witness who testified on behalf of this group was Joe Davis, who works for a commercial broadcaster, and had only anecdotal information concerning noncommercial stations. Because of his lack of expertise in this area, the Panel did not credit his testimony. Such action on the part of the panel is not arbitrary.

Nor was it arbitrary for the Panel to decide not to rely on the statutory rates set for use of the musical works by noncommercial broadcasters. The arbitrators rejected the non-CPB, commercial broadcasters' request to look to these rates because the agreements, at the insistence of the parties to the agreements, are not even considered precedent for setting future rates for the use of the musical works. If anything, it would be arbitrary to rely on these values as a benchmark for setting rates for a completely different category of works when they had no acknowledged value for readjusting the rates for the works to which they do apply. Had the Panel wished to use these rates, it needed at the very least an opportunity to examine the circumstances surrounding the adoption of the "no precedent" clause. It would have also required record evidence to substantiate such bold assertions on the part of the users as the notion that these rates were set at a rate higher than what would have been negotiated in the marketplace. Non-CPB Broadcasters Reply Petition at 7; RIAA Reply at 11. Because of these infirmities, the Register finds the Panel did not act arbitrarily in rejecting the rates set for the section 118 license as a benchmark.

Thus, in the end, the Panel accepted RIAA's proposal to set the rate for noncommercial broadcasters at onethird the rate established for commercial broadcasters. The Panel also provided a separate rate for archived programming subsequently transmitted over the Internet, substituted programming and up to 2 side channels set at one-third the rate established for Internet-only transmissions. The Panel made this adjustment based on its determination that a noncommercial broadcaster should not be subject to commercial rates when streaming programming consistent with the educational mission of the station, over the Internet. Report at 94. However, the Panel imposed a limitation on the use of this reduced rate for Internet-only transmissions to avoid the possibility that a non-CPB broadcaster could use its unique position to essentially become a commercial webcaster.

The Register accepts the Panel's methodology for setting the rate for noncommercial broadcasters. The rates proposed by the Panel, however, must be adjusted to reflect the Register's recommendation to set a unitary rate for both commercial broadcasters and webcasters. Using the proposed base rate of 0.07¢ and reducing this value by two-thirds, the adjusted rate for non-CPB, noncommercial broadcasters is 0.02¢ (one-third of 0.07¢, the base rate for all transmissions, rounded to the nearest hundredth) per performance, per listener. This rate shall apply to a simultaneous retransmission of the non-CPB, noncommercial over-the-air radio programming, archiving programming subsequently transmitted over the Internet, substituted programming, and up to two side channels. The rate for all other Internet-only transmissions is 0.07¢

One last disputed issue raised by the non-CPB, noncommercial broadcasters is the imposition of the same \$500 minimum fee that the CARP set for all other licensees. They argue that a \$500 minimum fee far exceeds any reasonable rate that should be imposed on this category of users in light of the financial considerations that distinguish them from the other services. Non-CPB Broadcasters Reply Petition at 10. In support of this position, the users cite Dr. Murdoch's testimony to illustrate that the Internet license for use of SESAC's repertoire is less than \$100. But this is not the total amount that a noncommercial station would pay; it would also have to pay fees to BMI and ASCAP in order to license all the works included in the sound recordings covered by the section 114 license. The minimal amount that a webcaster must pay to cover the combined works administered by the three PROs is \$673, more than the proposed minimum rate to operate under the section 114 license. Webcasters PFFCL ¶ 363. In any event, the Panel set the rate at \$500 to cover administrative costs to the copyright owners and access to the sound recordings. It was not arbitrary to impose a minimum fee on the Non-CPB, noncommercial broadcasters that merely covers costs for these rudimentary purposes nor can it be deemed excessive in light of what these entities pay the PROs for the public performance of musical works.

11. Consideration of Request for Diminished Rates and Long Song Surcharge

RIAA requested a surcharge for songs longer than five minutes. RIAA PFFCL ¶ 210. Its request was denied because the Panel did not find that such a charge was included in most of the relevant license agreements. Report at 105. RIAA, however, argues that the Panel misread the Yahoo! agreement. RIAA Petition at 42. It notes that Yahoo! could estimate the number of performances it made by multiplying its listening hours by a fixed number of performances and that when it did so, the record companies received compensation for [material redacted subject to a protective order] performances, even though Yahoo! may have only played, for example, 5 12-minute classical recordings in an hour. Id. The Yahoo! agreement, however, does not require that it employ the estimation methodology; it merely states that Yahoo! may make this calculation. Thus, there was no probative evidence that the marketplace valued a classical sound recording, or similar sound recordings of longer than average duration, at a different rate. Consequently, it was not arbitrary for the Panel to reject RIAA's suggestion to impose a "long song" surcharge. In any event, it is highly likely that this concern will be addressed for the time period to which these rates apply, since most services will be using the estimation formula for calculating the number of performances which assumes 15 performances for each aggregate tuning hour.31 See section IV.11, infra.

On the other side, webcasters asked that there be no royalty fee for songs that are less than thirty seconds long, citing technology problems or the use of song-skip functions. Webcasters Petition at 71. The Panel disagreed and saw no

<sup>&</sup>lt;sup>31</sup> Nevertheless, RIAA has raised a valid point and future CARPs should carefully consider how to value performances of longer recordings, such as classical music, to ensure that the copyright owner is fully compensated. That being said, no party should assume that a particular approach to the problem is being advocated by the Register for adoption by a future CARP.

need to make any adjustment. It noted that the use of the blended rate from which it calculated the proposed rates was itself based upon figures which already took into account problem performances that had occurred during the initial period. This adjustment was expressly made for the first 1.5 billion transmissions only. Report at 106–107. The Panel chose not to make a similar adjustment for subsequent performances because the Yahoo! agreement did not provide for such an adjustment.

Likewise, the Panel determined that the use of the skip function provides a benefit to webcasters and it saw no need to penalize copyright owners for the benefit that flowed to the users through a conscious use of a function provided by the service. Moreover, none of the negotiated agreements provided for any reduction in rate for skipped songs. Report at 107. Consequently, the Panel did not provide a lower rate or exemption for truncated performances resulting from use of the skip song function.

The Webcasters object to the Panel's conclusion, maintaining that the Panel failed to adequately explain its decision and consider relevant evidence. See Webccasters Petition at 71. They contend that the Panel should have given more weight to three of the 26 agreements, which provided an exemption for performances less than thirty seconds in duration. Such action, would itself, have been arbitrary. Clearly, the Panel could not rely on these agreements when it had already disregarded them for purposes of establishing the royalty rates.

Moreover, RIAA makes a number of arguments in support of the Panel's decision. First, it notes that the performance of even a portion of a sound recording without a license is an infringement of a copyright owner's rights. As such, there is no a priori reason for making 30-seconds-or-fewer performances exempt from royalty obligations. Second, RIAA cites 17 U.S.C. 114(h)(2)(B) to demonstrate that Congress recognized the value of performances of limited duration and the right to license such performances. Specifically, this section exempts copyright owners licensing public performances of sound recordings from the requirement to make these sound recordings available on no less favorable terms or conditions to all bona fide entities, when they are licensing promotional performances of up to 45 seconds in duration. RIAA Reply at 71-75. These arguments support the Panel's decision not to exempt performances of thirty seconds or less, and as such, its

decision is neither arbitrary nor contrary to law.

The Panel did, however, grant the users an exemption for incidental performances, citing the existence of a similar term in the Yahoo! agreement as the basis for its decision. Specifically, the Panel "exclude[d] transmissions or retransmissions that make no more than incidental use of sound recordings, including but not limited to, certain performances of brief musical transitions, brief performances during news, talk and sports programming, commercial jingles, and certain background music." Report at 108. This is not a disputed provision.

With the agreement of the parties, the Panel also exempted performances of sound recordings made pursuant to a private license agreement. Id.

The Register notes, however, that the Webcasters' concerns regarding the Panel's determination not to grant its request to impose no royalty on songs less than 30 seconds in duration are ameliorated for the current licensing period. Under the proposed terms of payment, a service may estimate the number of performances for purposes of determining the extent of copyright liability on an "Aggregate Tuning Hour" basis, which calculates payment on the basis of 15 performances per hour.32 This approach alleviates a Licensee's obligation to account for and pay for each performance, including those that are less than 30 seconds in duration.

# 12. Methodology for Estimating the Number of Performances

Until each service can account for each performance, and is required to do so, there is a need for a methodology that will allow a service to make a reasonable estimate of the number of performances. Accordingly, the Panel proposes the following procedure:

For the period up to the effective date of the rates and terms prescribed herein, and for 30 days thereafter, the statutory licensee may estimate its total number of performances if the actual number is not available. Such estimation shall be based on multiplying the licensee's total number of Aggregate Tuning Hours by 15 performances per hour (1 performance per hour in the case of retransmissions of AM and FM radio stations reasonably classified as news, business, talk or sports stations, and 12 performances per hour in the case of all other AM and FM radio stations.

Report at 110.

The Broadcasters object to the Panel's formulation for estimating the number of performances, arguing that for many program formats, e.g., news, business, talk, or sports stations, the estimate would likely significantly overstate the use of music by these stations.

Broadcasters Petition at 57. However, they do not offer an alternative methodology for calculating these performances. Moreover, a mere likelihood of overstating the values in some cases is not enough to undo the Panel's formulation.

Likewise, Webcasters argue that the 30-day cutoff period for using the methodology for estimating the number of performances is arbitrary because there is no record support for this determination. Webcasters Petition at 72. Instead, they propose allowing the Services to employ this methodology through the remainder of the current licensing period, which ends December 31, 2002, since it will be used, in any event, by most Services for purposes of calculating their liability for their past usage of the sound recordings. Id.

What is troubling about this provision is the Panel's determination to require a full accounting of each performance beginning 30 days after the effective date of the order setting the rates and terms. The Report documents that many services are not currently equipped to track or accurately account for each performance, and the Register agrees. In fact, until the issuance of final rules regarding Records of Use, there are no requirements for tracking these performances. Because the Office has yet to establish just how a service will account for its use of the sound recordings, the Register determines that the proposed timeframe for requiring a strict accounting is arbitrary. Instead, the rule shall require that a Service begin accounting for each performance in accordance with the rules and regulations regarding Records of Use 30 days after the effective date of final rules. These rules shall determine what information needs to be calculated to determine which sound recordings have been performed, how many of such performances occurred, and when and how often such information shall be collected by the Services. Meanwhile, interim rules are being promulgated that

<sup>32</sup> The Webcasters had advocated the use of "Aggregated Tuning Hours" as a way to address their concerns regarding the Panel's decision not to provide a lower rate for partial performances. Webcasters Petition at 71–72. Their argument, however, is not the bases for the Register's recommendation to provide for use of the estimation methodology throughout the license period.

The Register is proposing this course of action in the short term merely to address separate concerns of the Register regarding the logistics involved in reporting the number of performances of sound recordings. This recommendation on the part of the Register should in no way be construed as undermining the Panel's decision that transmissions of sound recordings of less than 30 seconds are compensable.

will, for the immediate future, impose more modest reporting requirements on Services.

In the meantime, for the remainder of the period covered by this proceeding (i.e., through December 31, 2002), Services may estimate the number of performances in accordance with the Panel's formulation. While this is not the perfect solution, it represents a reasonable approximation of the number of performances. And in those cases where a Service believes the formulation overestimates the use of the sound recordings, it has the option of actually counting the number of performances and calculating the royalties accordingly. Certainly, it cannot be seriously argued that a Service would be unduly burdened by undertaking this task. Conversely, if after accounting for each of the performances in the programs which are allowed to use the one performance per hour estimate, the Service finds its programming performs more sound recordings than the approximation, a Service benefits from use of the Panel's methodology.

#### 13. Discount for Promotion and Security

RIAA proposed a 25% discount to any service that includes promotional and security features beyond those required under either the webcasting license or the ephemeral recording license. Because that proposal would exceed the scope of the terms set forth in the law, the Panel declined RIAA's invitation to provide for such discounts within the context of the statutory license. Report at 110. It is clear that the Panel may reject such a proposal, as it did here, because the statutory license does not expressly require that such a rate be established. No party contested the Panel's determination on this issue. Therefore, the Register sees no reason to question the Panel's decision.

#### 14. Ephemeral Recordings for Services Operating Under the Section 114 License

A transmitting organization entitled to make transmissions of sound recordings under the webcasting license may also make a single ephemeral copy of each work to facilitate the transmission under an exemption in the law or it may make multiple copies of these works pursuant to a statutory license. See 17 U.S.C. 112(a) and (e), respectively. In addition to setting rates and terms for the webcasting license, the Panel in this proceeding had the responsibility for setting the rates for the ephemeral recordings. The Office combined these section 112 and section 114 proceedings because the licenses are interrelated and the beneficiaries of the license, just as the users, are in most instances the same for both the webcasting license and the ephemeral recording license. However, there is one group of users of the ephemeral recording license that is exempt from the digital performance right—services which provide transmissions to a business establishment for use by the business establishment within the normal course of its business ("business establishment services").33 17 U.S.C. 114(d)(1)(C)(iv).

During the proceeding, the Services argued that these "ephemeral" copies have no economic value apart from the value of the performance they facilitate. Webcasters Petition at 67; Broadcasters Petition at 50. In support of this position, the Services cite with approval a Copyright Office Report which stated that the Office found no rationale for "the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value, and are made solely to enable another use that is permitted under a separate license." Report at 98, citing U.S. Copyright Office, DMCA Section 104 Report at 114, fn 434 (August 2001). The Panel also contended that experts on both sides took this view. Webcasters Petition at 66, citing Jaffe W.D.T. 52-54; Tr. at 6556; Tr. at 2632 (Nagle). Had there been nothing more, the Panel might have agreed with the Services and adopted the Office's position. In construing the statute, however, the Panel found that Congress did not share the Copyright Office's view. Instead, the Panel found that Congress required that a rate be set for the making of ephemeral copies in accordance with the willing buyer/willing seller standard.34 Report at 98-99.

The Panel utilized the same approach in setting rates for the ephemeral

recording license as it had in setting the rates for the webcasting license. Report at 104. It first examined the 26 RIAA agreements for evidence that market participants paid a fee to make ephemeral copies and how much they paid. Of the 26 agreements, fifteen did not contain any rate for the ephemeral license and did not purport to convey this right; two used a percentage of overall revenues; eight used a percentage (calculable to 10%) of the performance royalty fees paid; and one paid a flat rate per use of the license for a year (calculable to 8.8% of the performance royalty fees paid). Id. From this, the Panel identified a range of rates between 8.8% and 10% of the performance fees paid.35 It then chose to place significant weight on the 8.8% value because it was derived from the information in the Yahoo! agreement to which the Panel has given considerable weight throughout this proceeding. Id. However, the Panel did not rely solely on the Yahoo! agreement in this instance, choosing instead to give minimal weight to the eight other agreements that set the ephemeral rate at 10% of the performance rate, and so rounded the 8.8% value up to 9.0%. Id. Both Webcasters and Broadcasters filed Petitions to Modify in which they object to the Panel's approach to setting the ephemeral rate. They argue that the evidence supports their position that the ephemeral copies have no independent economic value apart from the performances they facilitate. In the alternative, they maintain that the value of the ephemeral copies is included in the royalty fee for the performance of the sound recording. Consequently, they contend that the appropriate way to set the ephemeral rate would be to determine the economic value of the ephemeral copies and reduce the performance rate by that amount. Webcasters Petition at 67; Broadcasters Petition at 51.

Moreover, the Services disagree with the Panel's use and analysis of the voluntary agreements for setting this rate. Specifically, they cite the lack of an ephemeral rate in 15 of the 26 agreements, even though it is clear that these recordings are necessary to effectuate a performance, as evidence of RIAA's view that the making of ephemeral copies had only a de minimis

<sup>&</sup>lt;sup>33</sup> Business establishment services deliver sound recordings to business establishments for the enjoyment of the establishments' customers. Two such services, AEI, Music Network, Inc. and DMX Music, Inc., participated in these proceedings. These companies merged into a single company during the course of this proceeding. AEI/DMX provides music to more than 120,000 businesses, including Pottery Barn, Abercrombie & Fitch, Red Lobster, and Nordstrom. The rate setting process as it pertains to the business establishment services is discussed in Section IV.14.

<sup>34</sup> The Panel and the Services note that the Register has adopted a policy position regarding the making of ephemeral recordings which attributes no economic value to the making of such recordings when "made solely to enable another use that is permitted under a separate compulsory license." U.S. Copyright Office, DMCA Section 104 Report at 144, fn.434. (August 2001). This statement was made in a different context and has no relevance to the current proceeding. The task of the Register in this proceeding is to determine whether the Panel's determination is arbitrary or contrary to law without regard to the Office's own views on how the law should read to implement policy objectives.

<sup>35</sup> Most of the original 26 license agreements did not grant the right to make ephemeral copies, either because the Service did not realize it needed this right or because the Service had assumed the negotiated rate covered all rights needed to make the digital transmissions. However, that trend did not continue. Licenses that were renewed expressly granted the right to make ephemeral copies for a fee. Report at 58, fn 39.

value, Broadcasters Petition at 52. For this reason, webcasters and broadcasters argue that RIAA placed little value on these copies and implicitly acknowledged that the value of these recordings is at best de minimis. They then criticize the Panel's methodology, asserting that the calculation of the ephemeral rate based upon the rates derived from the Yahoo! agreement for a per performance model, totally ignored the fact that Yahoo! agreed to pay a flat fee once it began making payments on a per performance basis, without regard to the number of performances. Webcasters Petition at 69: Broadcasters Petition at 53. Finally, Webcasters object to any use of the non-Yahoo! agreements in calculating this rate because the Panel had already found these agreements to be unreliable for purposes of setting the marketplace rates. Similarly, the Broadcasters question the Panel's reliance on eight of the agreements that it had rejected earlier as "unreliable benchmarks." Id. at 54.

The non-CPB, noncommercial broadcasters adopt the objections to ephemeral recording rate put forth by the commercial broadcasters. Noncommercial Broadcasters Petition at

On the other hand, RIAA supports the Panel's determination in general, noting that the CARP relied primarily on the Yahoo! agreement to calculate the ephemeral rate for webcasters. It maintains, however, that the Panel should have afforded the 25 voluntary agreements more weight and set the rate at 10% of the performance rate in deference to the fact that many RIAA licensees had agreed to a negotiated or effective ephemeral rate of 10%. RIAA Reply at 68. RIAA also challenges the Services' complaints in general, noting that in spite of all the objections to the Panel's determination, the Services fail to offer any evidence regarding an alternative rate.

The Panel's approach in setting the ephemeral rate was not arbitrary. It calculated the rate based on the fees Yahoo! actually paid to RIAA for the right to make ephemeral reproductions. Use of the Yahoo! agreement for this purpose was perfectly logical, and consistent with the general approach taken by the Panel in determining rates for webcasting. What causes concern, however, is the Panel's reliance, even to a small degree, on the ephemeral rates set forth in eight of the 25 voluntary agreements it had previously repudiated. Such action is arbitrary unless the Panel can offer a clear explanation for its actions. It did not do so and, in fact, it stated that its review

of the 26 licenses "reveals an inconsistent, rather than a consistent, pattern." Report at 100. Moreover, the Panel conceded that these agreements "do not represent evidence which establishes RIAA's proposed rate." Id. at 104. Nevertheless, the Panel granted "very modest effect" to those agreements which have ephemeral rates around 10% to justify its decision to round the 8.8% effective rate up to 9%. Considering those agreements is clearly arbitrary and, consequently, to the extent the Panel gave any weight to any license agreement other than the Yahoo! agreement, it acted in an arbitrary manner. Accordingly, the rate for the ephemeral license for licensees operating under section 114 should be set at 8.8% of the performance rate.

## 15. Minimum Fees

The Panel established a minimum fee of \$500 for each licensee for use of the webcasting license and the ephemeral recording license. These rates are in line with those negotiated by RIAA and the 26 services with which it reached an agreement. The Panel determined that RIAA would not have negotiated a minimum fee that failed to cover at least its administrative costs and the value of access to all the works up to the cost of the minimum fee. Report at 95. The adoption of the \$500 minimum, however, is predicated on the adoption of a per performance rate and not a percentage-of-revenues. The Panel implied that had it decided to adopt a percentage-of-revenue model, the minimum fee would have been more substantial because the Panel would have had to consider more carefully the impact of start-up services with little revenue. Report at 95.

Because the minimum rate is calculated to cover at least the administrative costs of the copyright owners in administering the license and access to the sound recordings, the Panel applied the rate to all webcasting services and made it payable as a nonrefundable advance against future royalty fees to be paid during that year, due upon the first monthly payment of each year. Moreover, the Panel offered no proration of the fee, making it due in full for any calendar year in which a service operates under the statutory license. Report at 96.

RIAA objects to the low value for the minimum fee set by the Panel because it fails to take into account the broad range of rates established in the licenses RIAA negotiated in the marketplace.36

Moreover, as a policy matter, RIAA contends that use of the lowest value set forth in a single agreement discourages copyright owners from adopting a low minimum fee in a single instance to accommodate special circumstances for a particular service. RIAA Petition at 44-45. Finally, RIAA faults the Panel for justifying its choice by comparing the \$500 minimum fee to the amount that the Services pay the performing rights organizations (PROs) under a blanket license. RIAA rejects this rationale on two fronts. First, the minimum fee does not approximate the amounts that are paid to the PROs, and second, use of the musical works benchmark has been found by the CARP to be an inappropriate measure for establishing

fees in this proceeding.

In response, Broadcasters first note that RIAA never disputed the Panel's understanding for the existence of a minimum fee, or claimed that a higher fee is necessary to achieve the stated purposes of the minimum fee. Namely, the minimum fee is meant to cover the costs of incremental licensing, i.e., the cost to the license administrator of adding another license to the system without regard to the number of performances made by the Licensee, see Webcasters PFFCL ¶ 361, and access to the entire repertoire of sound recordings. Broadcasters Reply at 12-13; Webcasters Reply at 52-53. Moreover, they claim that the minimum fee is in line with the fees paid to the performing rights organizations which can serve as a benchmark for the minimum because "they serve the same purposes that the CARP identified in setting the minimum fees for the statutory license at issue." Broadcasters Reply at 14; Webcasters Reply at 52, 55. The Services, however, do not blindly accept the Panel's proposed fee, arguing first that the record supports a much lower minimum fee. They also strenuously object to RIAA's request for a \$5,000 minimum, arguing that such a high minimum would be confiscatory for most users of the license, especially for those radio stations that play little featured music. Broadcasters Reply at 16; Webcasters Reply at 56.

None of these arguments compel the Librarian to reject the proposed \$500 minimum. The Panel set a minimum rate to accomplish two purposes, and none of the parties argue that the \$500 fee falls outside the "zone of reasonableness" for such rates. If anything, the fee may be viewed as too low, if one takes into account the

<sup>36</sup> According to RIAA, a \$5,000 minimum fee is the typical amount paid by users in the marketplace, without regard to whether the

royalties are paid on a percentage of revenue base or in accordance with a per performance metric. RIAA Petition at 43.

minimum amounts paid to the performing rights organizations for the blanket license for performing musical works. Together each Service must pay, at the very least, a total of \$673 to the three performing rights organizations to cover access to the musical works for use over the Internet and the incremental cost of licensing—the very purposes for which the minimum fee is being set in this proceeding.

Whether to utilize the musical works benchmark was a decision for the Panel and it chose not to do so. This approach was not arbitrary. As it had done throughout this proceeding, the Panel could choose, as it did, to rely on agreements negotiated in the marketplace between willing buyers and willing sellers. Moreover, the Panel could propose any rate consistent with the agreements so long as the proposed rate would cover costs for administering the license and access to the works.37 For this reason, the Panel examined the agreements offered into evidence by the RIAA and chose the lowest value that RIAA had accepted in a prior agreement. It did so because it assumed that an entity would not agree to a minimum rate that would result in a loss. Had RIAA truly believed that the \$500 minimum fee was inadequate to cover at least the administrative costs and the value of access, the Panel reasoned that it would have required a higher fee. This approach is not arbitrary and, consequently, the proposed minimum fee is adopted for the period covered by this proceeding.

16. Ephemeral Recordings for Business Establishment Services ("BES")

a. Rates for use of the statutory license. Business establishment services are well-established businesses, which have offered their services for many years. Among the established businesses in this group are AEI Music Network, Inc., 38 DMX Music, Inc., Muzak, Inc., PlayNetwork, Inc. and Radio Programming and Management Inc. Two of the old guard, AEI and DMX, and one new service, Music Choice, participated in this proceeding. At an early stage of this proceeding, but after filing a direct case, Music Choice withdrew from the proceeding.

Of the services offered by AEI and DMX only those services that transmit musical programs to their customers via cable or satellite in a digital format are eligible for the ephemeral recording license. The Panel referred to this aspect of the business as the "broadcast model" of the service. Through this process, these services make hundreds of thousands, if not millions, of copies of the sound recordings. The law allows these services to perform sound recordings publicly by means of a digital transmission under an exemption in section 114.39 However, Congress did not exempt these services from copyright liability when making copies of these works in the normal course of their business. Rather, Congress created a statutory license to cover the making of ephemeral recordings by these services. In its proposed findings of fact and conclusions of law, DMX and AEI proposed a flat fee of \$10,000 per year 40 for each company for the making of buffer and cache copies, but argued in the alternative for a zero rate. See DMX/ AEI PFFCL ¶ 44. In support of the alternative position, DMX/AEI argued that Congress had only envisioned a minimal rate to compensate the copyright owners for the use of ephemeral copies. It also cited the Copyright Office's Section 104 DMCA Study for the proposition that ephemeral recordings have no independent economic value apart from its use to facilitate transmissions. However, as RIAA points out, these businesses have always paid for such copies. Report at 115–116, citing RIAA Reply to DMX/AEI PFFCL ¶¶ 8–12. RIAA asked that rate be set at 10% of gross revenues with a minimum fee of \$50,000 a year and asked the Panel to

39 Section 114(d)(1)(iv) provides that:(d) Limitations on Exclusive Right.—

Notwithstanding the provisions of section 106(6)—
(1) Exempt transmissions and retransmission.—
The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—

(C) a transmission that comes within any of the following categories—

(iv) a transmission to a business establishment for use in the ordinary course of its business: Provided, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the second recording performance complement. Nothing in this clause shall limit the scope of the exemption. Nothing in this clause shall limit the scope of the exemption in Clause (ii).

<sup>40</sup> At the beginning of this proceeding, DMX and AEI each filed a separate direct cause in which each company proposed a flat rate of \$25,000 for each year (prorated for the October–December 1998 period) covered by these proceedings for use of the section 112 license. Knittel W.D.T. 19; Troxel W.D.T. 15.

refrain from setting rates tailored to the needs of specific companies. RIAA made the later request because AEI/ DMX asserted that its digital database is already covered by preexisting licenses and therefore, it does not need an ephemeral license in order to make these phonorecords. Consequently, AEI/ DMX asked the Panel to set a rate to cover only the cache and buffer copies it needed to facilitate its transmissions and to exclude the value of the database copies when setting the rate for the ephemeral license. In fact, AEI/DMX contends that it was arbitrary for the Panel to set a rate "for all ephemeral copies which may be utilized in the operation of a broadcast service" when it had received evidence for setting a rate only for buffer and cache copies. DMX/AEI Petition at 4. It also maintains that the statute contemplates that the Panel set rates according to the needs and desires of the parties. Id. at 8-10.

RIAA disagreed with this approach, asking the panel to establish a technology-neutral rate to cover the making of all copies that a business establishment service may need to make under the license. It also proposed that the CARP rely on license agreements between the copyright owners and Business Establishment Services when fashioning the appropriate rate and not the 26 voluntary licenses considered when setting the webcasting rates.

As an initial matter, the Panel had first to decide which copies and how many are covered by the ephemeral recording license. This is a necessary step in the process, because the statutory license allows a transmitting organization to make and retain no more than a single phonorecord of a sound recording, except as provided "under the terms and conditions as negotiated or arbitrated under the statutory license." Section-by-section analysis of the H.R. 2281 as passed by the United States House of Representatives on August 4, 1998, Committee Print, Serial No. 6, 105th Cong., 2d Sess., p. 61.

Thus, the Panel considered and ultimately rejected DMX/AEI's request for a rate that only covered certain types of ephemeral copies. It did so in large part because it determined that Congress had "intended to create blanket licenses which would afford each licensee all the rights necessary to operate such a service," and noted that in this case, that would include "the right to make any and all ephemeral copies utilized in a broadcast background music service." Report at 118. This interpretation of the law is consistent with the purpose of the section 112 license.

In creating the ephemeral recording license, Congress sought to provide a

<sup>&</sup>lt;sup>37</sup> Had the Panel recommended a royalty based on a percentage-of-revenues, its recommended minimum fee also would have had to serve the function of ensuring that copyright owners receive adequate compensation in cases where a service makes substantial use of copyrighted works but generates little or no revenue.

<sup>&</sup>lt;sup>38</sup> AEI and DMX were separate business entities at the beginning of this proceeding. During the course of this proceeding, they merged into a single company.

way for any licensee or business establishment service to clear all the reproduction rights involved in making digital transmissions of sound recordings under section 114. Congress "intended [this provision] to facilitate efficient transmission technologies, such as the use of phonorecords encoded for optimal performance at different transmission rates or use of different software programs to receive the transmissions." H.R. Rep. No. 105– 796, at 90 (1998). These copies are known as "ephemeral recordings." "The term "ephemeral recording" is a term of art referring to certain phonorecords made for the purpose of facilitating certain transmissions of sound recordings, the reproduction of which phonorecords is privileged by the provisions of section 112." Id. Because the purpose of the license is to facilitate a lawful transmission of a sound recording under a statutory license or exemption, it would appear that the license covers not only the first reproduction of the sound recording on a company's server, but also all intermediate copies needed to facilitate the digital transmission of the sound recording.

The mere fact that the license covers different ephemeral recordings that may be catalogued in different ways does not mean that a separate rate must be set for each category. Had the record supported different rates for different categories of ephemeral recordings, or for different types of business establishment services, it is conceivable that the Panel might have chosen to differentiate among these categories or types of businesses by assigning different rates to each one.41 See also Order (dated July 16, 2001) (advising Panel that it could set different rates for different business models, provided that the record supported such a decision). Whether such an approach would have been arbitrary would depend upon the findings of the Panel in light of the record evidence and, more importantly, upon whether the proposed rates covered the making of all ephemeral copies needed to facilitate the digital transmission of a sound recording under the section 114 business to business exemption.

The section 112 license is without question for the benefit of all services operating under the business to business exemption and not just DMX/AEI. A rate tailored only to meet the specific needs of a single service would by its

very nature be arbitrary if the rate failed to cover the entire scope of the license. The fact that DMX/AEI has chosen to license the copies in its database through a private agreement and use the statutory license to cover the remaining ephemeral copies would not relieve the Panel of its responsibility to set rates for all ephemeral copies which fall within the scope of the license, including those copies in a DMCA compliant database. Other business establishment services using a DMCA-compliant database exist and may choose to meet their copyright liability by operating under the statutory license. See RIAA reply at 18; Report at 116. It is without question that such a service may take advantage of the statutory license without participating in a CARP proceeding.

Once these rates are set, a Service can either operate entirely under the statutory license or, alternatively, the Service may choose to make some ephemeral copies under the statutory license and others under a private agreement. These choices, however, have no bearing on the responsibility of the Panel to establish a rate, or a schedule of rates, that would allow a Service to utilize the license to the full extent of the law.

In fashioning the rate, the Panel considered the arguments put forth by the parties and ultimately rejected DMX/AEI's basic premise that Congress had contemplated a de minimis rate to compensate for "leakage" (use of ephemeral copies to make phonorecords for sale) and, its interpretation of what it characterized as the Copyright Office's view that such copies have no independent economic value. This decision was reached after examining the statute and its legislative history and finding nothing that directly supported the "leakage" theory.42 Moreover, the Panel had already determined that its responsibility was not to give effect to the Copyright Office's view on how the law should change. Instead, it determined that its duty was "to follow the current Congressional mandate set forth in section 112(e)(4) and determine a separate rate for ephemeral copies' based upon the willing buyer/willing seller standard. Report at 98-99. Thus, the Panel rejected AEI/DMX's proposal to set a low rate based upon its finding that these entities have always paid substantial royalties to record companies in exchange for the use of its complete catalogue. Report at 119.

In any case, the starting point for setting the rates for the ephemeral recording license as it applies to business establishment services is the statute. It provides that, as with the rates for the webcasting license, the rates should be those that "most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. 112 (e)(4). Thus, the Panel turned to actual agreements that have been negotiated in the marketplace to discover how the market values these rights. As discussed previously, the use of rates negotiated in the marketplace is not arbitrary. It eliminates the need to try to value specific economic, competitive, and programming factors because the parties would have already accounted for these considerations during the negotiation process and their impact would be reflected in the negotiated rates.

Both sides seem to agree with the Panel's approach. RIAA had no complaint with the Panel's use of voluntarily negotiated licenses in setting the ephemeral rates for business establishment services. Moreover, DMX/ AEI's own counsel acknowledged that marketplace agreements were appropriate benchmarks for establishing the rates for the rate for the section 112 license and conceded that the agreements relied upon were worthy of consideration. Tr. 9577-78 (Sept. 12, 2001). Nevertheless, DMX/AEI did argue that the proposed rate constitutes an undue financial burden that thwarts Congress' intent to facilitate the adoption of new technologies. DMX/AEI Petition at 11.

The question is which agreements should be considered when setting the rates for the ephemeral reproductions. Having found that the business establishment services offer a completely different type of service from webcasting, the Panel rejected DMX/AEI's invitation to use the ephemeral rates negotiated by the webcasters. Report at 121. Instead, the Panel opted to use the license agreements that had been negotiated between individual record companies and background music services 43 as a benchmark for setting the relevant section 112 rates even though, in some instances, the license conveyed some

<sup>&</sup>lt;sup>42</sup> RIAA supports the Panel's determinatin, nothing that he legislative history makes clear that the purpose of the license is "to create fir and efficient licensing mechanisms." RIAA Reply at 20, citing H.R. Conf. Rep. 105–796 at 79–80 (1998).

<sup>&</sup>lt;sup>41</sup> As RIAA points out, insufficient evidence exited to support his approach and accommodate DMX/AEI's proposal. RIAA reply at 15, citing Panel report at 118-10/9.

<sup>&</sup>lt;sup>43</sup> A background music service is a type of Business Establishment Service that complies and delivers music to business establishments who play the music for the enjoyment of their customers. Among the license agreements considered by the Panel were those negotiated between the major record labels and AEI, DMX, Muzak, Play Network, Inc., and Radio Programming and Management Inc. Report at 123-124.

rights to the licensee beyond the reproduction and distribution of the sound recording. The Panel was not troubled by this observation, however, because it found that in all cases the right to copy and distribute the works was by far the most important right for which the licensee paid royalties. Moreover, it noted that the rates did not fluctuate through the year even when a service altered its method for delivering music. Thus, the Panel used the rates reflected in these licenses to establish a range of rates (10-15% of gross proceeds) for consideration. See Report at 117; see e.g., RIAA Reply to AEI/DMX at 2. From this data, it found that "background music companies and record companies would agree to a royalty of at least 10% of gross proceeds," and set the rate accordingly. Report at 126.

RIAA agrees with the Panel's approach, and that it was appropriate for the Panel not to consider contracts for ephemerals made in the course of webcasting because these businesses are not comparable with Business Establishment Services. They serve different customers and operate under different economic business models with different delivery methods. For example, Business Establishment Services make reproductions of sound recordings and deliver them via cable or satellite for use by the establishment for the enjoyment of their customers. These differences are further underscored by transactions in the marketplace. RIAA notes that within a single license with one business entity, it negotiated a separate rate for webcasting ephemeral copies and a separate rate for ephemeral copies used by the Business Establishment Service. RIAA reply at 24-25. The fact that RIAA negotiated separate rates for the making of ephemeral recordings for different services supports a finding that the businesses are not comparable. Therefore, it was not arbitrary for the Panel to decline to consider the ephemeral rates set forth in the licenses between the webcasters and the record companies when establishing a rate for **Business Establishment Services** 

Moreover, an examination of the record evidence clearly shows that the 10% of revenues rate set by the Panel is not an arbitrary figure. RIAA Exhibits 9 DR, 10 DR, 11 DR, 12 DR, 13 DR, 14 DR, 26 DR, 27 DR, 28 DR, 60-A DR, 66 DR-X, Knittel Rebuttal Ex. 22; Knittel W.D.T. 14-15. It represents the low end of the range of rates set forth in the agreements between the major record labels and Business Establishment Services. The fact that two agreements, negotiated during a period of

uncertainty whether there was a legal obligation to pay anything for the satellite transmissions they covered, reflect a lower rate does not change the outcome. See Report at 124. As RIAA points out, the rate in one of these agreements was reset at a substantially higher rate once the initial contract with the lower rate expired. RIAA Reply to AEI/DMX at 25, fn 25. Nor is there any reason to reject the Panel's determination, as DMX/AEI contends, because the Panel failed to adjust for the promotional value to the record companies or bring these rates into line with those set for Subscription Services in the previous proceeding. As the Panel stated on several occasions, it is unnecessary to adjust a marketplacenegotiated rate for the promotional value that flows to the record companies because that benefit would already be reflected in the contract price, if it were

important to the parties.
Likewise, DMX/AEI's second premise for rejecting the Panel's determination must also be discarded. It argued that the Panel set an arbitrarily high rate for Business Establishment Services when compared to the rate set for Subscription Services in an earlier proceeding. DMX/AEI Petition at 19-20. As discussed in a previous section, see section IV.3, rates set for Subscription Services in a prior proceeding are just not comparable to rates under consideration in this proceeding. Marketplace rates for making reproductions of sound recordings for use by a Business Establishment Service have no established relationship to rates set under a totally different standard for the public performance of sound recordings by Subscription Services. There is no established nexus between the industries, the marketplaces in which they operate, or the rights for which the rates are set. To make any adjustments to the ephemeral rate based on the rate for the digital performance rate adopted for the Subscription Services in a previous proceeding would itself be patently arbitrary.

 b. Minimum fee. The statute also requires the Panel to set a minimum fee for use of the license. Using the same licenses, it determined that the minimum fee should be \$500 a year based on its observation that most, although not all, willing buyers have not agreed to a fee approaching RIAA's proposed rate of \$50,000 a year and that some agreements include no minimum fee at all. Because there is no discernable trend in the licenses, the Panel chose to adopt the same fee it proposed for the webcasting licenses because it is calculated to cover at least the administrative costs of the license.

RIAA argues that a \$500 minimum is too low and contradicts the record evidence, citing the existence of significantly higher rates in many of the industry agreements and the lack of any agreement with a minimum as low as \$500. RIAA Petition at 46-47. RIAA further contends that the CARP by its own reasoning should set a significantly higher minimum fee where, as here, the ephemeral rate is based on a percentageof-revenue model. Id. at 49. The Copyright Owners are concerned that a low minimum rate will increase "the risk that a service, especially a new one, will make a large number of ephemeral copies and not generate revenues, effectively giving the service a blanket license for free." Id. Consequently, the Copyright Owners ask the Librarian to adopt their proposal and set the minimum fee for use of the ephemeral license at rate no lower than \$50,000.

DMX/AEI objects to RIAA's request for a higher minimum fee. It maintains that RIAA requested rate is inconsistent with record evidence, which establishes that either DMX/AEI currently pays [material redacted subject to a protective order] in its direct licensing agreements with the major labels for On-Premises services or that it is disproportionately high when compared with the minimum fees paid by other members of the background music service industry. DMX/AEI Reply at 7. Accordingly, AEI/ DMX urges the Librarian not to entertain

the RIAA's request.

An examination of the relevant agreements reveals that almost all of these agreements have a substantial minimum fee for the making of ephemeral recordings and that all of those minimum fees are considerably greater than the \$500 minimum proposed by the CARP. Consequently, the Panel's decision to adopt a \$500 minimum fee when no contract considered by the Panel contained a minimum fee as low as \$500 is arbitrary. The minimum fees in the agreements before the CARP were by and large significantly higher than the \$500 fee proposed by the CARP and should have served as the guiding principle in setting the minimum fee for the Business Establishment Services, especially in light of the Panel's earlier observation that a percentage of revenue fee requires the establishment of a substantial minimum fee to offset the risk that a start-up Service with little revenue could operate without paying adequate royalty fees for use of the license. Moreover, RIAA notes that each contract before the CARP was between a Business Establishment Service and a single record label. It then makes the argument that "[i]f a business

establishment service is willing to pay a minimum fee [significantly higher than the minimum fee proposed by the Register] for access to just one label's sound recordings, the value of the blanket license to all copyrighted recordings must be higher." RIAA Petition at 46. Based on this evidence, the Panel should have set the minimum fee for the section 112 license as it applies to Business Service Establishments at a significantly higher level, and it was arbitrary not to have done so.

The Register notes that minimum fees have been as low as \$5,000 and as high as the \$50,000 minimum proposed by RIAA. The purposes of the minimum fee, however, are to cover the costs of administration and insure an adequate return to the copyright owners based upon the value of the right with respect to the overall fee for use of the license. For these reasons, the Register proposes a minimum fee of \$10,000 per Licensee. The fee is at the low end of the range of negotiated minimum fees and is in line with DMX/AEI's own valuation of the license at \$10,000 per year. Admittedly this fee appears high when compared with the minimum fee for the eligible nonsubscription services, but it serves to balance the risk associated with setting a statutory fee based upon a percentage of revenues instead of a fee that would charge a specific fee for each reproduction.

#### 17. Effective Period for Proposed Rates

The rates and terms proposed by the parties were the same for each time period under consideration by the Panel. Consequently, the Panel proposed, and the parties agreed, that the same rates and terms would apply to both periods: (1) October 28, 1998 (the effective date of the DMCA) through December 31, 2000; and (2) January 1, 2001, through December 31, 2002. The Register finds that it was not arbitrary for the Panel to propose the same rates and terms for both periods under consideration.

#### B. Terms

Sections 112(e)(4) and 114((f)(2)(B) require that the CARP propose and the Librarian adopt terms for administering payment for the two statutory licenses. The Panel stated that, as with rates, the standard for setting these terms is what the willing seller and the willing buyer would have negotiated in the marketplace. The Panel did not interpret the standard to include necessarily setting terms that "represent the optimum alternative from the standpoint of administrative convenience and workability." It

reasoned that such considerations were "not part of the governing standard for the Panel, nor [were they] a matter on which [the Panel] would have either record evidence or institutional expertise." Consequently, the Panel made no determination pertaining to administrative efficiency, choosing instead to defer to the expertise of the Librarian. Report at 129.

For the most part, the terms proposed by the Panel are those to which all parties to the CARP proceeding have agreed in negotiations. For this reason, the Panel accepted all terms on which the parties agreed, finding that where there was agreement, the terms meet the statutory standard under which these terms must be set. Moreover, the Panel found that there was evidence in the record to support adoption of most of these terms.

The Register is skeptical of the proposition that terms negotiated by parties in the context of a CARP proceeding are necessarily evidence of terms that a willing buyer and a willing seller would have negotiated in the marketplace. Especially when those terms relate to administration of the receipt and distribution of royalties by collectives that are artificial (but necessary) creations of the statutory license process, rather than entities likely to be created in an agreement between a copyright owner and a licensee, the fiction that those terms reflect the reality of the marketplace is difficult to accept.

Not all of the terms recommended by the Panel are terms that the Register would have adopted if her task were to determine the most reasonable terms governing payment of royalties. However, in light of the standard of review, the Register recommends accepting the terms adopted by the Panel except in the relatively few instances where the Panel's decision was either arbitrary or not feasible. See Report at 129 ("we must defer to the expertise of the Librarian the final evaluation of the administrative feasibility of terms which willing buyers and willing sellers would agree to in marketplace negotiations"). The discussion that follows addresses, first, the terms recommended by the Panel that one or more parties have asked the Librarian to reject. Following that discussion, the Register discusses those terms recommended by the Panel that, although they are acceptable to the parties, she proposes to modify or reject, because they are arbitrary or contrary to law.

#### 1. Disputed Terms

The parties were unable to reach a consensus with respect to two issues: (1) The incorporation of specific definitions for the terms, "Affiliated," "AM/FM streaming," "Broadcaster," and "Non-Public;" and (2) the designation of an agent for unaffiliated copyright owners.

a. Definitions. The Panel carefully considered the utility of incorporating the proposed terms for Affiliated," "AM/FM streaming," "Broadcaster," and "Non-Public." It decided to reject the webcasters" request to adopt the disputed terms and definitions, noting that the terms were not applicable to the rate structure ultimately adopted by the Panel. The Parties have filed no objection on this point and the Register finds no reason to include a definition of these terms in the regulations.

Notwithstanding the Panel's decision as to these terms, it did incorporate other terms that were necessary for the administration of the license. The proposed definitions for these additional terms are based upon submissions from the parties made at the Panel's request. See, Services' Submission of Definitions; Proposed Definitions of the Recording Industry Association of America, Inc. (Feb. 12, 2002). Again, no party has filed an objection to the Panel's decision to propose additional terms the purpose of which is make the regulatory framework clearer and more functional.

b. Designated Agent for Unaffiliated Copyright Owners. Read literally, section 114 appears to require that Services pay the statutory royalties directly to each Copyright Owner. As a practical matter, it would be impractical for a Service to identify, locate and pay each individual Copyright Owner whose works it performed. As a result, in the administration of the predecessor statutory license for noninteractive subscription services, a Collective was appointed to receive and distribute all royalties. The RIAA has served as the Collective for the nonsubscription services.

In this proceeding, the Parties proposed and the CARP agreed to a modification of the single-collective model. Licensees making transmissions of a public performance of a sound recording pursuant to the statutory license in section 114 and/or making ephemeral recordings of these works under the statutory license in section 112(e) would make all payments owed under these licenses to the designated "Receiving Agent." 44 The Receiving

<sup>44</sup> A "Receiving Agent" is the agent designated by the Librarian of Congress through the rate setting process for the collection of the royalty fees from

Agent would then make further distribution of the royalty fees to the two Designated Agents <sup>45</sup> who would then distribute the royalty fees among the Copyright Owners and Performers in accordance with the methodology set forth in the regulations.

The CARP accepted the proposal of the parties to designate a single Receiving Agent, SoundExchange, in order to maximize administrative efficiencies for the Copyright Owners and Performers, on the one hand, and Licensees, on the other. SoundExchange is a nonprofit organization formed by RIAA for the purpose of administering the sections 112 and 114 statutory licenses. It has over 280 member companies, affiliated with more than 2,000 record labels accounting for over 90% of the sound recordings lawfully sold in the United States. W.D.T. at 4 (Rosen). SoundExchange is governed by a board comprised of representatives of Copyright Owners and Performers and, under a recent reorganization, the Copyright Owners and artists representatives will have equal control over the SoundExchange Board. AFM/ AFTRA PFFCL ¶ 6.

In addition to its role as a Receiving Agent, the CARP accepted the Parties proposal that both SoundExchange and Royalty Logic, Inc. ("RLI") serve as Designated Agents. RLI is a for profit subsidiary of Music Reports, Inc. and was created to offer a competitive alternative to SoundExchange. W.D.T. at 2 (Gertz). The purpose of having two designated agents is to provide Copyright Owners with the option of electing to receive their royalty distribution from either SoundExchange or RLI. The Receiving Agent will allocate royalties to the two Designated Agents based on the Copyright Owner's designation.46

However, the parties could not agree on which Designated Agent would distribute funds to Copyright Owners who failed to make an election. The Webcasters proposed that RLI be named the agent for unaffiliated Copyright Owners, but Copyright Owners and Performers asked the Panel to designate SoundExchange as the agent for those copyright owners.

After carefully considering the role of the Designated Agent for unaffiliated copyright owners and the record evidence, the Panel made a determination to name SoundExchange as the Designated Agent for those copyright owners who fail to expressly designate either SoundExchange or RLI as their agent to receive and distribute royalties on their behalf. The primary reason for this designation was the preference expressed by the Copyright Owners and the Performers. The Panel reasoned that the Services had no real stake in deciding this issue because their responsibilities and direct interest end with the payment of the royalty fees to the Receiving Agent. Moreover, AFM and AFTRA, which represent artists who are among the beneficiaries of the license, expressed a strong preference for the designation of SoundExchange as the agent in these instances. The Copyright Owners made this choice based on the non-profit status of SoundExchange, its experience with royalty payments, and the fact that SoundExchange has agreed to a reorganization that gives artists substantial control over its operations. The Panel agreed with the reasons articulated by the Copyright Owners and Performers and found that the probable outcome of a marketplace negotiation would have been the selection of SoundExchange.

Broadcasters contest the Panel's decision to designate SoundExchange as the agent for unaffiliated copyright owners. They assert that there is no record evidence to support the Panel's observation that this was the inevitable outcome of marketplace negotiations, in spite of the actual requests made by Copyright Owners who participated in this proceeding. Broadcasters Petition at 59–60.

The Copyright Owners and Performers disagree, and assert that unlike the Licensees whose only concern is whom to pay and when, copyright owners and performers have a vital interest in how their royalty fees are collected and distributed and have expressed a strong preference for SoundExchange as the designated agent. See RIAA Reply at 81; AFM/AFTRA Reply at 2. Certainly, Performers believe that SoundExchange will make fair and equitable distributions and not deduct additional costs beyond those necessary costs incurred to effectuate a distribution. AFM/AFTRA Reply at 2-3 ("SoundExchange is subject to the joint

and equal control of copyright owner and performer representatives with an interest in maintaining an efficient operation that will distribute the maximum possible license fees, that SoundExchange is a nonprofit organization so that no copyright owner's or artist's royalty share will be diminished by anything other than necessary distribution costs, and that SoundExchange is experienced and has demonstrated its commitment to identifying, finding and paying performers during its distribution of Section 114 and 112 subscription service statutory license fees."); see also RIAA Reply at 83.

The CARP's decision to designate SoundExchange as the agent for unaffiliated copyright owners is fully supported by the record evidence and, consequently, it is not arbitrary. First, the fact that Copyright Owners and Performers commend SoundExchange to the Panel is direct evidence of their preference for a non-profit organization that has already invested heavily in a system designed to locate and pay Copyright owners and Performers. It would be arbitrary to ignore their wishes where, in fact, the alternative agent represents primarily broadcasters, television stations, and other Licensees—not Licensors. See AFM/ AFTRA PFFCL concerning terms ¶ 13. Second, SoundExchange is a non-profit collective that will deduct only necessary distribution costs. On the other hand, RLI, the entity competing for the agency designation, is a for-profit organization whose acknowledged goal is to make a profit. In fact, RLI has suggested that it needs the designation from the CARP in order to generate enough revenues to make it worthwhile to take on the role of an agent for purposes of making distributions of statutory license royalty fees. See Services Proposed Findings (12/18/01) at ¶ 16. In addition, RLI has been unable to say just how much it expects to deduct as reasonable costs, making it impossible to ascertain whether designation of RLI would be in the best interest of the unaffiliated copyright owners. Third, Performers and Copyright Owners have a direct governance role in the operation of SoundExchange, thereby insuring their interests are not neglected or overshadowed by the interests of the agent. AFM/AFTRA Reply at 4; AFM/ AFTRA PFFCL concerning terms ¶ 6. Performers have expressed strong concerns about the designation of an agent who has no mechanism or apparent interest in providing the Copyright Owners and Performers with

the Licensees operating under the sections 112 and 114 licenses.

<sup>&</sup>lt;sup>45</sup> A "Designated Agent" is an agent designated by the Librarian of Congress through the same rate setting process who receives royalty fees paid for use of the statutory licenses from the Receiving Agent and makes further distributions of these fees to Copyright Owners and Performers.

<sup>&</sup>lt;sup>46</sup>The Register is skeptical of the benefit of this two-tier structure, which adds expense and administrative burdens to a process the purpose of which is to make prompt, efficient and fair payments of royalties to Copyright Owners and Performers with a minimum of expense. However, the Register cannot say that the Panel's decision, presumably based on the conclusion that competition among Designated Agents will result in better service to Copyright Owners and Performers, is arbitrary.

a means to voice their concerns. See AFM/AFTRA PFFCL concerning terms ¶ 9 (noting that designation of RLI as the agent for unaffiliated copyright owners would have the undesirable effect of forcing these non-members "into an agency relationship with an entity that not only is not governed by Copyright Owners and Performers, but also is not even required to obtain their guidance and input regarding policies, procedures or distribution methodologies.").

For all the foregoing reasons, the Register concludes that the CARP was not arbitrary in designating SoundExchange as the agent for unaffiliated copyright owners. Of the four factors considered by the Panel, each weighs in favor of SoundExchange. Of course, any Copyright Owner or Performer can affirmatively choose RLI to act on its behalf as a Designated

Agent.

c. Gross proceeds. As discussed earlier, the Panel proposed the adoption of a rate for Business Establishment Services making ephemeral recordings under section 112 at 10% of gross proceeds. The Panel recognized the necessity of also formulating a definition of "gross proceeds" in order to make the rate workable. To meet this need, it opted to incorporate, with minor modifications to accommodate the section 112 license, the definition used in many of the background music agreements even though the definition is less than clear on its face as to what constitutes gross proceeds. The lack of specificity, however, did not trouble the Panel because it expected the parties to adopt the understandings within the industry developed during the normal course of dealings.

RIAA does not share the Panel's view. It objects to the proposed definition of "gross proceeds," arguing that the provision fails utterly to define the term in any meaningful way. It also contends that it is arbitrary to rely on industry practices to flesh out the industry's understanding of the term when no record evidence exists about these practices. To remedy this situation, RIAA proposes that the Librarian adopt the definition of "gross proceeds" for a Business Establishment Service that is set forth in the agreement between SoundExchange and MusicMusicMusic ("MMM"). RIAA Exhibit No. 60A, RIAA asserts that this is the only record evidence on this point. RIAA petition at

DMX/AEI rejects RIAA's suggestion that the Librarian adopt a definition from an agreement with MMM, "an unsophisticated licensee, who by its

own admission is unlikely to pay any significant royalties pursuant to the

agreement." DMX/AEI Reply at 3. RIAA's proposed definition of "gross proceeds" would include fees generated by equipment rental, maintenance services, advertising of all kinds, and revenues payable to a licensee from any source in connection with the licensee's background music service. Id. at 5. DMX/AEI argues that such a definition is utterly contrary to the normal practice of using proceeds derived solely from the delivery of copyrighted sound recordings to business establishments.

As a general principle, terms pertaining to a statutory license must be defined with specificity. At first blush, the proposed definition of "gross proceeds" does not appear to meet this standard, merely reciting that a Business Establishment Service must pay a sum equal to ten percent of the licensee's gross proceeds derived from use of the musical programs that are attributable to copyrighted recordings. However, record evidence suggests the definition may be as simple as the CARP's characterization of the term. Barry Knittel,47 in discussing the promotional funds established for the benefit of the record companies from gross proceeds, stated that the money placed into these accounts comes from the company's gross revenues, and that these revenues are generated from all the billings for music. Tr. 8384 (Knittel). This statement suggests that the determination of what constitutes "gross revenues" is not a mystery and that it is merely the amount the Business Establishment Services receive from their customers for use of the music. This approach, however, does not necessarily appear to capture in-kind payments of goods, free advertising or other similar payments for use of the license. See RIAA Petition

Consequently, the Register proposes to expand on the CARP's approach and adopt a definition of "gross proceeds" which clarifies that "gross proceeds" shall include all fees and payments from any source, including those made in kind, derived from the use of copyrighted sound recordings to facilitate the transmission of the sound recording pursuant to the section 112 license. See RIAA Exhibit No. 60A DR. (Second Webcasting Performance and Webcasting and Business Establishment **Ephemeral Recording License** Agreement). The Register finds it necessary to expand upon the proposed definition to avoid any confusion on this point and not as a means to capture additional revenue streams not

contemplated by the Panel or by the parties to such agreements. Because the record fails to enumerate the types of revenue that may be received in kind, the Register finds it unwise to include even an illustrative list when there is little evidence of what specific types of revenues should be considered in the calculation of "gross proceeds." Thus, the definition of "gross proceeds" shall be as follows:

"Gross proceeds" shall mean all fees and payments, including those made in kind, received from any source before, during or after the License term which are derived from the use of copyrighted sound recordings pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public a performance of a sound recording under the limitation on the exclusive rights specified in section 114(d)(1)(c)(iv).

## 2. Terms Not Disputed by the Parties

a. Limitation of Liability. One of the terms proposed by the Parties and adopted by the CARP was that "A Designated Agent shall have no liability for payments made in accordance with this subsection with respect to disputes between or among recipients." The Parties explained that the purpose of this provision was to "mak[e] clear that so long as a Designated Agent complies with the requirements adopted by the Copyright Office for distributing royalties, then a beneficiary of statutory royalties cannot sue such Designated Agent for payments made in accordance with Copyright Office regulations. Any dispute among recipients should be resolved among themselves.'

The Register understands the desire of SoundExchange and RLI to insulate themselves from liability in cases where Copyright Owners or Performers dispute the Designated Agent's allocation of royalties. The Copyright Office's experience with distribution proceedings for the statutory licenses for which royalties are initially paid to the Copyright Office provides ample evidence that individual copyright owners and performers often believe they are being paid less than their fair share of statutory license royalties, and it is natural for a Designated Agent to wish to avoid having to defend against such claims.

Moreover, as has become apparent in the course of the pending rulemaking proceeding relating to notice and recordkeeping for the use of sound recordings under the statutory licenses, the information that Licensees will be providing to the Designated Agents about which (and how many) sound recordings they have performed will be far from perfect, and the Designated Agents necessarily will have to make

<sup>&</sup>lt;sup>47</sup> Barry Knittel, formerly President of AEI Music Markets—Worldwide is now DMX/AEI's Senior Vice President of Business Affairs Worldwide.

difficult judgments in determining how to allocate royalties. If the Designated Agents had comprehensive information identifying each and every performance transmitted by a Licensee, and each and every Copyright Owner and Performer for each performance, in theory they could pay each Copyright Owner and Performer his or her precise share of royalties. In the real world-or at least for the remainder of the period for which this proceeding is setting rates and terms—some Copyright Owners and Performers inevitably will receive less than their precise share of the royalty pool, and others will receive more than their precise share. The Designated Agents should not be held to an impossibly high standard of care.

Unfortunately, neither the CARP nor the Librarian have the power to excuse a Designated Agent (or, for that matter, anyone else) from liability for a breach of a legal obligation. If a Designated Agent has in fact wrongfully withheld or underpaid royalties to a Copyright Owner or Performer, the law may provide a remedy to the Copyright Owner or Performer.

Although the Librarian cannot excuse the Designated Agents from potential liability, he can adopt terms that provide a mechanism that will make claims by disgruntled Copyright Owners or Performers less likely, or at least less viable. The Register therefore recommends that in place of the ultra vires provision excusing the Designated Agents from any liability, the Librarian provide that the Designated Agents must submit to the Copyright Office a detailed description of their methodology for distributing royalty payments to nonmembers. This information will be made available to the public, and any Copyright Owner or Performer who believes the methodology is unfair will have an opportunity to raise an objection with the Designated Agent prior to the distribution, thereby giving the Designated Agent the opportunity to address the problem before the Copyright Owner or Performer has suffered any alleged harm. This provision is modeled on a provision proposed by the parties to the previous CARP proceeding to establish rates and terms for noninteractive subscription services under section 114. See proposed 37 CFR 260.3(e), in Notice of Proposed Rulemaking, Determination of Reasonable Rates and Terms for the Public Performance of Sound

Recordings, 66 FR 38226, 38228 (July 23, 2001).<sup>48</sup>

The Register also proposes that the Librarian adopt a term that provides a Designated Agent with an optional mechanism pursuant to which the Designated Agent may request that the Register provide a written opinion stating whether the Agent's methodology for distributing royalty payments to nonmembers meets the requirements of the terms for distribution set forth in the implementing regulations. Although such an opinion by the Register would not be binding on a court evaluating a claim against a Designated Agent, it can be assumed that a court would find the opinion of the Register persuasive.

The Register anticipates that under this scheme, a Designated Agent that acts conscientiously and in good faith in the distribution of royalties will not be found liable to a Copyright Owner or Performer who is dissatisfied with his or her share of the distribution.

b. Deductions from Royalties for Designated Agent's Costs. The parties had proposed, and the CARP agreed, that Designated Agents be permitted to deduct from the royalties paid to Copyright Owners and Performers "reasonable costs incurred in the licensing, collection and distribution of the royalties paid by Licensees \* \* \* and a reasonable charge for administration." The Register recommends that the provision permitting deductions for costs incurred in licensing be removed from this provision. See § 261.4(i). Although a Designated Agent may happen to engage in licensing activities, licensing per se is not among the responsibilities of a Designated Agent under the terms of the statutory license. The purpose of the Designated Agent is to receive and distribute the statutory royalty fees. There is no justification for permitting a Designated Agent to deduct costs incurred in licensing activity from the statutory royalties, and the CARP's acquiescence in this term was therefore arbitrary.

There was also a suggestion in testimony presented to the CARP that it would be proper for a Designated Agent to deduct from statutory royalties its costs incurred as a participant in a CARP proceeding. Tr. 11891—11893 (Williams). Nothing in § 261.4(i), including the references to "reasonable costs incurred in the collection and distribution of the royalties paid by Licensees," can properly be construed

as permitting a Designated Agent to deduct from the royalty pool any costs of participating in a CARP proceeding. Such activity is beyond the scope of collection and distribution of royalties. Of course, Copyright Owners and Performers may enter into agreements with a Designated Agent permitting such deductions, but a Designated Agent may not make such deductions from royalties due to unaffiliated Copyright Owners and Performers or those who have simply designated a Designated Agent without specifically agreeing to permit such deductions.<sup>49</sup>

c. Ephemeral Recording. The Register recommends that a definition of "Ephemeral Recording" be added to the definitions. This definition incorporates by reference the requirements set forth in section 112(e).

In a related provision, the Register has harmonized the language of §§ 261.3(b) and (c) and makes clear that beneficiaries of the statutory license for ephemeral recordings may make any number of ephemeral recordings so long as they are made for the sole purpose of facilitating the statutory licensees permitted transmissions of performances of sound recordings. The regulatory text proposed by the parties and accepted by the Panel provided that for Business Establishment Services, the section 112 royalty shall be paid "[f]or the making of unlimited numbers of ephemeral recordings in the operation of broadcast services pursuant to the Business Establishment exemption contained in 17 U.S.C. 114(d)(1)(C)(iv)," (emphasis added), but that for webcasters, the section 112 royalty shall be paid "[f]or the making of all ephemeral recordings required to facilitate their internet transmissions."

A literal reading of section 112(e) might lead to the conclusion that the ephemeral recording statutory license permits only the making of a single ephemeral recording, but the statute qualifies that provision by stating "(unless the terms and conditions of the statutory license allow for more)," and the legislative history makes clear that the terms established by the Librarian in this proceeding may include terms permitting the making of additional

<sup>48</sup> A similar provision is recommended with respect to the methodology for allocating royalties among Designated Agents.

<sup>&</sup>lt;sup>49</sup> The Register is also troubled by the parties permitting a Designated Agent to deduct "a reasonable charge for administration" which is included "to permit a for-profit Designated Agent to make a reasonable profit on royalty collection and distribution on top of the direct expenses that may be incurred in licensing, collection and distribution." Appendix B, p. B–13. But in light of the parties' acceptance and the CARP's adoption of a procedure permitting multiple Designated Agents, including a for-profit Designated Agent, the Register reluctantly cannot conclude that the provision is arbitrary.

ephemeral recordings. H.R.Rep. 105—796, at 89. Therefore, it is appropriate that the terms make clear that statutory licensees may make more than one ephemeral recording to accomplish the purposes of the statutory license.

The reference to "all" ephemeral recordings "required" to facilitate webcasters" transmissions, and the reference to "unlimited" recordings for Business Establishment Services' "operation", are arguably inconsistent with each other and somewhat ambiguous. To clarify that the scope of the section 112 statutory license is similar for both types of service, and to more accurately reflect the appropriate scope of that license, the Register recommends that the regulatory language provide, in the case of webcasters, "[f]or the making of any number of ephemeral recordings to facilitate the Internet transmission of a sound recording," and in the case of Business Establishment Services, "[f]or the making of any number of ephemeral recordings in the operation of a service pursuant to the Business Establishment

exemption." (Emphasis added). d. Definition of "Listener". The definitions of "Aggregate Tuning Hours" and "Performance" both include references to a "listener" or to "listeners." It is not clear from the text of these definitions whether each person who is hearing a performance is a "listener" even if all the persons hearing the performance are listening to the same machine or device (e.g., two or more persons listening to a performance rendered on a single computer). Clearly the intent is that all persons listening to a performance on a single machine or device constitute, collectively, a single "listener," because "listener" is used here to assist in defining what constitutes a single performance. Indeed, it would be difficult to implement an interpretation that counted all individuals in such circumstances as separate "listeners." Accordingly, the Register recommends including a definition that provides that if more than one person are listening to a transmission made to a single machine or device, those persons collectively constitute a single listener.

e. Timing of Payment by Receiving Agent to Designated Agent. The terms proposed by the Parties and accepted by the CARP included a provision requiring that the Receiving Agent pay a Designated Agent its share of any royalty payments received from a Licensee within 20 days after the day on which the Licensee's payment is due. While the Register recognizes that such a provision would, in principle, be unobjectionable, she concludes that

under current conditions it is administratively unfeasible.

As the parties recognized in their commentary on this provision, "The parties do not know either the payment methodology that will be used to calculate royalties or the types of information that will be reported by Licensees. Such determinations cannot be made before the conclusion of this proceeding and the Notice and Recordkeeping Proceeding." Appendix B, p. B–10. However, they assumed that the Receiving Agent and the Designated Agent could agree on a "reasonable allocation method" even in the absence of any firm data.

The Register is skeptical. It is apparent at this point in the rulemaking on notice and recordkeeping that obtaining accurate reports of Licensees' use of sound recordings will be difficult, particularly during the first few months. Moreover, the initial reports of use will require reporting on less than a monthly basis, making it impossible in many instances for the Receiving Agent to make any determination whatsoever as to a Designated Agent's allocated share during at least the first month or two in which royalties are paid. Reports on past use of sound recordings (i.e., from October 28, 1998, to the present) will present an even more formidable challenge. It is difficult to imagine that 20 days after the Receiving Agent has received the first royalty payments from Licensees, the Receiving Agent and the Designated Agent will have any reliable information from which they can ascertain how the proceeds should be allocated. The Register therefore recommends that the proposed requirement that payment be made within 20 days of the day on which the Licensee's payment is due be replaced by a requirement that the payment be made "as expeditiously as is reasonably possible," a more flexible term that recognizes the difficulty in establishing a specific deadline. The Register cautions that during the first few months of operation of the system of reporting and or royalty payment, "expeditious" payment under the circumstances may be a matter of many weeks, if not months.

It can reasonably be expected that for future periods governed by future CARPs or negotiated agreements, more stringent requirements of prompt payment will be appropriate. But it must be recognized that in this initial, transitional period, delays will be

inevitable.
f. Allocation of Royalties among
Designated Agents and Among
Copyright Owners and Performers. The
terms proposed by the Parties and

accepted by the Panel provide that the Receiving Agent allocate royalty payments to Designated Agents "on a reasonable basis to be agreed among the Receiving Agent and the Designated Agents," and that the Designated Agents distribute royalty payments "on a reasonable basis that values all performances by a Licensee equally." The Panel accepted these terms, but observed that a "determination of how royalty payments should be apportioned between the Designated Agents cannot be made until the parties know the rate structure adopted by the CARP (in the first instance) and the Librarian of Congress (on review) and the outcome of the Notice and Recordkeeping Proceeding." Appendix B, at p. B-10. Similarly, the Panel remarked that "The terms do not specifically provide how a Designated Agent should allocate royalties among parties entitled to receive such royalties because such allocation will depend upon the rate structure adopted by the CARP (in the first instance) and by the Librarian of Congress (on review) and may be affected by the types of reporting requirements that are adopted by the Copyright Office in the Notice and Record-keeping Proceeding for eligible nonsubscription transmissions and business establishment services." Id., p. B-12.

The Register recommends that the provisions for allocation of royalty payments among Designated Agents and for allocation of royalties among parties entitled to receive such royalties be clarified, making explicit the relationship between the notice and recordkeeping regulations and the allocation of royalties. Each of these provisions should provide that the method of allocation shall be based upon the information provided by the Licensee pursuant to the regulations governing records of use of performances.

The Register has some trepidation about the provision in § 261.4(a), proposed by the Parties and recommended by the CARP, that provides that apportionment among Designated Agents "shall be made on a reasonable basis that uses a methodology that values all performances equally and is agreed upon among the Receiving Agent and the Designated Agents." (Emphasis added). The regulation does not provide what happens in the event that the Receiving Agent and the Designated Agents cannot agree on an allocation methodology. One could recommend a provision that gives the ultimate decisionmaking power to one of the parties or to a third party, but instead,

the Register proposes the addition of § 261.4(l), which would simply provide that in the event of a stalemate, "either the Receiving Agent or a Designated Agent may seek the assistance of the Copyright Office in resolving the dispute."

g. Choice of Designated Agent by Performers. A literal reading of the terms recommended by the Panel would permit a Copyright Owner to select the Designated Agent of its choice, but would require a Performer to accept the Designated Agent selected by the Copyright Owner; and the Panel's report appears to agree with this interpretation. Report at 132. However, the Report does not articulate any reason for the decision to deprive Performers of the same right to choose that is given to Copyright Owners, and the commentary in Appendix B is silent as well.

As the Panel acknowledged, "Copyright owners and performers, on the other hand, have a direct and vital interest in who distributes royalties to them and how that entity operates" Report at 132 (emphasis added). The Register agrees. It was arbitrary to permit Copyright Owners to make an election that Performers are not permitted to make. The Register can conceive of no reason why Performers should not be given the same choice. Accordingly, the Register recommends that § 261.4 be amended to provide that a Copyright Owner or a Performer may make such an election. See § 261.4(c) of the recommended regulatory text.

The Register has also inserted a housekeeping amendment to provide that for administrative convenience, a Copyright Owner's or Performer's designation of a Designated Agent shall not be effective until 30 days have passed.

h. Performers' Right to Audit. The terms proposed by the Parties and accepted by the CARP provided that a Copyright Owner may conduct an audit of a Designated Agent. These provisions also include safeguards to ensure that a Designated Agent is not subjected to more than one audit in a calendar year.

However, the terms do not provide that Performers have a similar right to conduct an audit of a Designated Agent, despite the fact that Performers, like Copyright Owners, depend upon the Designated Agent to make fair and timely royalty payments. The Parties' commentary in Appendix B states that audit rights are limited to Copyright Owners "rather than the entire universe

of Copyright Owners and Performers, which could number in the tens of thousands." Appendix B at p. B–24. The commentary suggests that it would be impracticable for a Designated Agent to be subject to audit from individual Performers. Apart from reproducing the Parties' commentary, the Panel offered no observations on this point.

The Register fails to understand how it would be "impracticable" to permit Performers, who depend on a Designated Agent for their royalty payments, to initiate an audit of the Designated Agent when the Copyright Owners may do so. The Designated Agent is given sufficient protection by virtue of the provision that it can be subject to only a single audit in a calendar year, by the provision that the party requesting the audit must bear the presumably considerable costs of the audit, and by the provision that any audit "shall be binding on all Copyright Owners and Performers." 50 The Register, therefore, recommends that the audit provisions be amended to permit not only Copyright Owners, but also Performers, to initiate an audit.

i. Effective date. Section 114(f)(4)(C) states that payments in arrears for the performance of sound recordings prior to the setting of a royalty rate are due on a date certain in the month following the month in which the rate is set. The effective date of the rates, however, is not necessarily the date of publication in the Federal Register. The Librarian has often set the effective date of a rate several months after the initial announcement of the decision. See Determination of Reasonable Rates and Terms for Subscription Services, 63 FR 25394 (May 8, 1998) (setting the effective date for the rate for subscription services three weeks after the date of publication of the final order in the Federal Register); Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55742 (October 28, 1997) (announcing an effective date of January 1, 1998, set to coincide with the next filing period of the statements of account).

Section 802(g) provides that the effective date of the new rates is "as set forth in the decision." 17 U.S.C. 802(g). The Register has interpreted the term "decision" to mean the decision of the

Librarian, since section 802(g) only refers to the decision of the Librarian. Thus, this provision has been interpreted as providing the Librarian with discretion in setting the effective date. Moreover, the courts have held that an agency normally retains considerable discretion to choose an effective date, where, as here, the statute authorizing agency action fails to specify a timetable for effectiveness of decisions. *RIAA* v. *CRT*, 662 F.2d. 1, 14 (D.C. Cir. 1981).

In setting an effective date, the Register has considered the impact of the rate on the Licensees and the administrative burden on the Office in promulgating regulations to insure effective administration of the license. Clearly, there will be a burden on many Licensees who, by law, are required to make full payment of all royalties owed for transmissions made since the effective date of the DMCA, October 28, 1998, on or before the 20th day of the month next succeeding the month in which the royalty rate is set. Moreover, the Copyright Office is in the midst of promulgating rules governing records of use that will be used to make distribution of royalty fees in accordance with the terms of payment.

Consequently, the Register proposes an effective date of September 1, 2002, which will require the Licensees to make full payment of the arrears on October 20, 2002. Payment for the month of September shall be due on or before November 14, 2002, the forty fifth (45th) day after the end of the month on which the rate becomes effective, in accordance with the term proposed by the parties and adopted by the CARP. Similarly, all subsequent payments shall be due on the 45th after the end of each month for which royalties are owed. This payment schedule provides the Licensees with additional time to make the initial payment and any necessary adjustments in their business operations to meet their copyright obligation.

#### V. Conclusion

Having fully analyzed the record in this proceeding, the submissions of the parties, the Register of Copyrights recommends that the Librarian adopt the statutory rates for the transmission of a sound recording pursuant to section 114, and the making of ephemeral phonorecords pursuant to section 112(e), as set forth below:

<sup>50</sup> It is noteworthy that although the Parties were unwilling to give Performers a right to initiate an audit, they did not hesitate to provide that Performers will be bound by an audit initiated by a Copyright Owner.

## SUMMARY OF ROYALTY RATES FOR SECTION 114(F)(2) AND 112(E) STATUTORY LICENSES

Type of DMCA—Complaint service	Performance fee (per performance)	Ephemeral license fees
Webcaster and Commercial Broadcaster:     All Internet transmissions, including simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts.	0.07¢	8.8% of Performance Fees Due.
Non-CPB, Non-Commercial Broadcaster:     (a) Simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts.	0.02¢	8.8% of Performance Fees Due.
(b) Other internet transmissions, including up to two side channels of programming consistent with the public broadcasting mission of the station.	0.02¢	8.8% of Performance Fees Due.
(c) Transmissions on any other side channels	0.07¢	8.8% of Performance Fees Due.
For digital broadcast transmissions of sound recordings pursuant to 17 U.S.C. 114(d)(1)(C)(iv).	Statutorily Exempt	10% of Gross Proceeds.
Minimum Fee:     (a) Webcasters, commercial broadcasters, and non-CPB, non-commercial broadcasters.	l \$500 per year for each licensee.	
(b) Business Establishment Services		\$10,000

In addition, the Register recommends that the Librarian adopt the terms of payment proposed by the CARP, as modified in the recommendation, and set September 1, 2002, as the effective date for the statutory rates and the terms of payment.

## VI. The Order of the Librarian of Congress

Having duly considered the recommendation of the Register of Copyrights regarding the Report of the Copyright Arbitration Royalty Panel in the matter to set rates and terms for Licensees making certain digital performances of sound recordings under section 114(d)(2) and those making ephemeral recordings under section 112(e), the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing this order, and amending the rules of the Library and the Copyright Office, announcing the new royalty rates and terms of payment for the sections 112 and 114 statutory licenses.

## List of Subjects in 37 CFR Part 261

Copyright, Digital audio transmissions, Performance right, Recordings.

#### **Final Regulation**

In consideration of the foregoing, part 261 of 37 CFR is added to read to as follows:

#### PART 261—RATES AND TERMS FOR **ELIGIBLE NONSUBSCRIPTION** TRANSMISSIONS AND THE MAKING OF EPHEMERAL REPRODUCTIONS

261.1 General.

261.2 Definitions.

Royalty fees for public performance 261.3 of sound recordings and for ephemeral recordings.

261.4 Terms for making payment of royalty fees and statements of account.

261.5 Confidential information.

Verification of statements of account. 261.6

Verification of royalty payments.

Unclaimed funds.

Authority: 17 U.S.C. 112(e), 114, 801(b)(1).

#### §261.1 General.

(a) This part 261 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of ephemeral recordings by certain Licensees in accordance with the provisions of 17 U.S.C. 112(e).

(b) Licensees relying upon the statutory license set forth in 17 U.S.C. 114 shall comply with the requirements of that section and the rates and terms

of this part.
(c) Licensees relying upon the statutory license set forth in 17 U.S.C. 112 shall comply with the requirements of that section and the rates and terms of this part.

(d) Notwithstanding the schedule of rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and services within the scope of 17 U.S.C. 112 and 114 concerning eligible nonsubscription transmissions shall apply in lieu of the rates and terms of this part.

#### § 261.2 Definitions.

For purposes of this part, the following definitions shall apply:

Aggregate Tuning Hours mean the total hours of programming that the Licensee has transmitted over the Internet during the relevant period to all end users within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions. By way of example, if a service transmitted one hour of programming to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. Likewise, if one listener listened to a service for 10 hours, the service's Aggregate Tuning Hours would equal 10.

Business Establishment Service is a Licensee that is entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) and that obtains a compulsory license under 17 U.S.C. 112(e) to make ephemeral recordings for the sole purpose of facilitating those

exempt transmissions.

Commercial Broadcaster is a Licensee that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission to make over-the-air broadcasts, other than a CPB-Affiliated or Non-CPB-Affiliated, Non-Commercial Broadcaster.

Copyright Owner is a sound recording copyright owner who is entitled to receive royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) or 114.

Designated Agent is the agent designated by the Librarian of Congress for the receipt of royalty payments made pursuant to this part from the Receiving

Agent. The Designated Agent shall make further distribution of those royalty payments to Copyright Owners and Performers that have been identified in § 261.4(c).

Ephemeral Recording is a phonorecord created solely for the purpose of facilitating a transmission of a public performance of a sound recording under the limitations on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) or under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Gross proceeds mean all fees and payments, as used in § 261.3(d), including those made in kind, received from any source before, during or after the License term which are derived from the use of copyrighted sound recordings pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on the exclusive rights specified in section 114(d)(1)(c)(iv).

Licensee is: (1) A person or entity that has obtained a compulsory license under 17 U.S.C. 112 or 114 and the implementing regulations therefor to make eligible non-subscription transmissions and ephemeral

recordings, or

(2) A person or entity entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) and that has obtained a compulsory license under 17 U.S.C. 112 to make ephemeral recordings.

Listener is a recipient of a transmission of a public performance of a sound recording made by a Licensee or a Business Establishment Service. However, if more than one person is listening to a transmission made to a single machine or device, those persons collectively constitute a single listener.

Non-CPB, Non-Commercial Broadcaster is a Public Broadcasting Entity as defined in 17 U.S.C. 118(g) that is not qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (e.g. the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained license from the copyright owner of such sound

recording; and

(3) An incidental performance that both: (i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used

as a theme song).

Performer means the respective independent administrators identified in 17 U.S.C. 114(g)(2)(A) and (B) and the parties identified in 17 U.S.C.

114(g)(2)(C).

Receiving Agent is the agent designated by the Librarian of Congress for the collection of royalty payments made pursuant to this part by Licensees and the distribution of those royalty payments to Designated Agents, and that has been identified as such in § 261.4(b). The Receiving Agent may also be a Designated Agent.

Side channel is a channel on the Web Site of a Commercial Broadcaster or a Non-CPB, Non-Commercial Broadcaster, which channel transmits eligible nonsubscription transmissions that are not simultaneously transmitted over-the-air

by the Licensee.

Webcaster is a Licensee, other than a Commercial Broadcaster, Non-CPB, Non-Commercial Broadcaster or Business Establishment Service, that makes eligible non-subscription transmissions of digital audio programming over the Internet through a Web Site.

Web Site is a site located on the World Wide Web that can be located by an end user through a principal Uniform Resource Locator (a "URL"), e.g., www.xxxxx.com.

#### § 261.3 Royalty fees for public performances of sound recordings and for ephemeral recordings.

(a) For the period October 28, 1998, through December 31, 2002, royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114(d)(2), and the making of ephemeral recordings

pursuant to 17 U.S.C. 112(e) shall be as follows:

(1) Webcaster and Commercial Broadcaster Performance Royalty. For all Internet transmissions, including simultaneous Internet retransmissions of over-the-air AM or FM radio broadcasts, a Webcaster and a Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.07¢ per performance.

(2) Non-CPB, Non-Commercial Broadcaster Performance Royalty.

(i) For simultaneous Internet retransmissions of over-the-air AM or FM broadcasts by the same radio station, a non-CPB, Non-Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.02¢ per performance.

(ii) For other Internet transmissions, including up to two side channels of programming consistent with the mission of the station, a Non-CPB, Non-Commercial Broadcaster shall pay a section 114(f) performance royalty of

0.02¢ per performance.

(iii) For Internet transmissions on other side channels of programming, a Non-CPB, Non-Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.07¢ per performance.

(b) Estimate of Performance. Until December 31, 2002, a Webcaster, Commercial Broadcaster, or Non-CPB, Non-Commercial Broadcaster may estimate its total number of performances if the actual number is not available. Such estimation shall be based on multiplying the total number of Aggregate Tuning Hours by 15 performances per hour (1 performance per hour in the case of transmissions or retransmissions of radio station programming reasonably classified as news, business, talk or sports, and 12 performances per hour in the case of transmissions or retransmissions of all other radio station programming).

(c) Webcaster and Broadcaster Ephemeral Recordings Royalty. For the making of any number of ephemeral recordings to facilitate the Internet transmission of a sound recording, each Webcaster, Commercial Broadcaster, and Non-CPB, Non-Commercial Broadcaster shall pay a section 112(e) royalty equal to 8.8% of their total

performance royalty.

(d) Business Establishment Ephemeral Recordings Royalty. For the making of any number of ephemeral recordings in the operation of a service pursuant to the Business Establishment exemption contained in 17 U.S.C. 114(d)(1)(C)(iv), a Business Establishment Service shall pay a section 112(e) ephemeral recording royalty equal to ten percent (10%) of the Licensee's annual gross

proceeds derived from the use in such service of the musical programs which are attributable to copyrighted recordings. The attribution of gross proceeds to copyrighted recordings may be made on the basis of:

(1) For classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program,

(2) For all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

(e) Minimum fee. (1) Each Webcaster, Commercial Broadcaster, and Non-CPB, Non-Commercial Broadcaster licensed to make eligible digital transmissions and/or ephemeral recordings pursuant to licenses under 17 U.S.C. 114(f) and/or 17 U.S.C. 112(e) shall pay a minimum fee of \$500 for each calendar year, or part thereof, in which it makes such transmissions or recordings.

(2) Each Business Establishment Service licensed to make ephemeral recordings pursuant to a license under 17 U.S.C. 112(e) shall pay a minimum fee of \$10,000 for each calendar year, or part thereof, in which it makes such

recordings.

## § 261.4 Terms for making payment of royalty fees and statements of account.

(a) A Licensee shall make the royalty payments due under § 261.3 to the Receiving Agent. If there are more than one Designated Agent representing Copyright Owners or Performers entitled to receive any portion of the royalties paid by the Licensee, the Receiving Agent shall apportion the royalty payments among Designated Agents using the information provided by the Licensee pursuant to the regulations governing records of use of performances for the period for which the royalty payment was made. Such apportionment shall be made on a reasonable basis that uses a methodology that values all performances equally and is agreed upon among the Receiving Agent and the Designated Agents. Within 30 days of adoption of a methodology for apportioning royalties among Designated Agents, the Receiving Agent shall provide the Register of Copyrights with a detailed description of that methodology.

(b) Until such time as a new designation is made, SoundExchange, an unincorporated division of the Recording Industry Association of America, Inc., is designated as the Receiving Agent to receive statements of account and royalty payments from Licensees. Until such time as a new

designation is made, Royalty Logic, Inc. and SoundExchange are designated as Designated Agents to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 114(g)(2) from the performance of sound recordings owned by such Copyright Owners.

(c) SoundÉxchange is the Designated Agent to distribute royalty payments to each Copyright Owner and Performer entitled to receive royalties under 17 U.S.C. 114(g)(2) from the performance of sound recordings owned by such Copyright Owners, except when a Copyright Owner or Performer has notified SoundExchange in writing of an election to receive royalties from a particular Designated Agent. With respect to any royalty payment received by the Receiving Agent from a Licensee, a designation by a Copyright Owner or Performer of a particular Designated Agent must be made no later than thirty days prior to the receipt by the Receiving Agent of that royalty payment.

(d) Commencing September 1, 2002, a Licensee shall make any payments due under § 261.3 to the Receiving Agent by the forty-fifth (45th) day after the end of each month for that month. Concurrently with the delivery of payment to the Receiving Agent, a Licensee shall deliver to each Designated Agent a copy of the statement of account for such payment. A Licensee shall pay a late fee of 0.75% per month, or the highest lawful rate, whichever is lower, for any payment received by the Receiving Agent after the due date. Late fees shall accrue from the due date until payment is received by the Receiving Agent.

(e) A Licensee shall make any payments due under § 261.3 for transmissions made between October 28, 1998, and August 31, 2002, to the Receiving Agent by October 20, 2002.

(f) A Licensee shall submit a monthly statement of account for accompanying royalty payments on a form prepared by the Receiving Agent after full consultation with all Designated Agents. The form shall be made available to the Licensee by the Receiving Agent. A statement of account shall include only such information as is necessary to calculate the accompanying royalty payment. Additional information beyond that which is sufficient to calculate the royalty payments to be paid shall not be required to be included on the statement of account.

(g) The Receiving Agent shall make payments of the allocable share of any royalty payment received from any Licensee under this section to the Designated Agent(s) as expeditiously as is reasonably possible following receipt of the Licensee's royalty payment and statement of account as well as the Licensee's Report of Use of Sound Recordings under Statutory License for the period to which the royalty payment and statement of account pertain, with such allocation to be made on the basis determined as set forth in paragraph (a) of this section. The Receiving Agent and the Designated Agent shall agree on a reasonable basis on the sharing on a prorata basis of any incremental costs directly associated with the allocation method. A final adjustment, if necessary, shall be agreed and paid or refunded, as the case may be, between the Receiving Agent and a Designated Agent for each calendar year no later than 180 days following the end of each calendar year.

(h) The Designated Agent shall distribute royalty payments on a reasonable basis that values all performances by a Licensee equally based upon the information provided by the Licensee pursuant to the regulations governing records of use of performances; Provided, however, that Copyright Owners and Performers who have designated a particular Designated Agent may agree to allocate their shares of the royalty payments among themselves on an alternative basis.

(i)(1) A Designated Agent shall provide to the Register of Copyrights:

(i) A detailed description of its methodology for distributing royalty payments to Copyright Owners and Performers who have not agreed to an alternative basis for allocating their share of royalty payments (hereinafter, "non-members"), and any amendments thereto, within 30 days of adoption and no later than 60 days prior to the first distribution to Copyright Owners and Performers of any royalties distributed pursuant to that methodology;

(ii) Any written complaint that the Designated Agent receives from a nonmember concerning the distribution of royalty payments, within 30 days of receiving such written complaint; and

(iii) The final disposition by the Designated Agent of any complaint specified by paragraph (i)(1)(ii) of this section, within 60 days of such disposition.

(2) A Designated Agent may request that the Register of Copyrights provide a written opinion stating whether the Agent's methodology for distributing royalty payments to non-members meets the requirements of this section.

(j) A Designated Agent shall distribute such royalty payments directly to the Copyright Owners and Performers, according to the percentages set forth in 17 U.S.C. 114(g)(2), if such Copyright

Owners and Performers provide the Designated Agent with adequate information necessary to identify the correct recipient for such payments. However, Performers and Copyright Owners may jointly agree with a Designated Agent upon payment protocols to be used by the Designated Agent that provide for alternative arrangements for the payment of royalties to Performers and Copyright Owners consistent with the percentages in 17 U.S.C. 114(g)(2).

(k) A Designated Agent may deduct from the royalties paid to Copyright Owners and Performers reasonable costs incurred in the collection and distribution of the royalties paid by Licensees under § 261.3, and a reasonable charge for administration.

(l) In the event a Designated Agent and a Receiving Agent cannot agree upon a methodology for apportioning royalties pursuant to paragraph (a) of this section, either the Receiving Agent or a Designated Agent may seek the assistance of the Copyright Office in resolving the dispute.

#### § 261.5 Confidential information.

(a) For purposes of this part, "Confidential Information" shall include the statements of account, any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) Confidential Information shall not include documents or information that at the time of delivery to the Receiving Agent or a Designated Agent are public knowledge. The Receiving Agent or a Designated Agent that claims the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) In no event shall the Receiving Agent or Designated Agent(s) use any Confidential Information for any purpose other than royalty collection and distribution and activities directly related thereto; Provided, however, that the Designated Agent may report Confidential Information provided on statements of account under this part in aggregated form, so long as Confidential Information pertaining to any Licensee or group of Licensees cannot directly or indirectly be ascertained or reasonably approximated. All reported aggregated Confidential Information from Licensees within a class of Licensees shall concurrently be made available to all Licensees then in such class. As used in this paragraph, the phrase "class of Licensees" means all Licensees paying fees pursuant to § 261.4(a).

(d) Except as provided in paragraph (c) of this section and as required by law, access to Confidential Information shall be limited to, and in the case of paragraphs (d)(3) and (d)(4) of this section shall be provided upon request, subject to resolution of any relevance or burdensomeness concerns and reimbursement of reasonable costs directly incurred in responding to such request, to:

(1) Those employees, agents, consultants and independent contractors of the Receiving Agent or a Designated Agent, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities directly related thereto, who are not also employees or officers of a Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of employment, require access to the records;

(2) An independent and qualified auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Receiving Agent or a Designated Agent with respect to the verification of a Licensee's statement of account pursuant to § 261.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty payments pursuant to § 261.7;

(3) In connection with future Copyright Arbitration Royalty Panel proceedings under 17 U.S.C. 114(f)(2) and 112(e), under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings, Copyright Arbitration Royalty Panels, the Copyright Office or the courts; and

(4) In connection with bona fide royalty disputes or claims by or among Licensees, the Receiving Agent, Copyright Owners, Performers or the Designated Agent(s), under an appropriate confidentiality agreement or protective order, attorneys, consultants and other authorized agents of the parties to the dispute, arbitration panels

or the courts.

(e) The Receiving Agent or Designated Agent(s) and any person identified in paragraph (d) of this section shall implement procedures to safeguard all Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to such Receiving Agent or Designated Agent(s) or person.

(f) Books and records of a Licensee, the Receiving Agent and of a Designated Agent relating to the payment,

collection, and distribution of royalty payments shall be kept for a period of not less than three (3) years.

#### § 261.6 Verification of statements of account.

(a) General. This section prescribes general rules pertaining to the verification of the statements of account

by the Designated Agent.

(b) Frequency of verification. A Designated Agent may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior three (3) calendar years, and no calendar year shall be subject to audit more than once.

(c) Notice of intent to audit. A Designated Agent must submit a notice of intent to audit a particular Licensee with the Copyright Office, which shall publish in the Federal Register a notice announcing the receipt of the notice of intent to audit within thirty (30) days of the filing of the Designated Agent's notice. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all Designated Agents, and all Copyright Owners and Performers.

(d) Acquisition and retention of records. The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than three (3) years. The Designated Agent requesting the verification procedure shall retain the report of the verification for a period of not less than three (3) years.

(e) Acceptable verification procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and qualified auditor, shall serve as an acceptable verification procedure for all Designated Agents with respect to the information

that is within the scope of the audit. (f) Consultation. Before rendering a written report to a Designated Agent, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit;

Provided that the appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Designated Agent requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of ten percent (10%) or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure; Provided, however, that a Licensee shall not have to pay any costs of the verification procedure in excess of the amount of any underpayment unless the underpayment was more than twenty percent (20%) of the amount finally determined to be due from the Licensee and more than \$5,000.00.

#### § 261.7 Verification of royalty payments.

(a) General. This section prescribes general rules pertaining to the verification by any Copyright Owner or Performer of royalty payments made by a Designated Agent; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or a Performer and a Designated Agent have agreed as to proper verification methods.

(b) Frequency of verification. A
Copyright Owner or a Performer may
conduct a single audit of a Designated
Agent upon reasonable notice and
during reasonable business hours,
during any given calendar year, for any
or all of the prior three (3) calendar
years, and no calendar year shall be
subject to audit more than once.

(c) Notice of intent to audit. A
Copyright Owner or Performer must
submit a notice of intent to audit a
particular Designated Agent with the
Copyright Office, which shall publish in
the Federal Register a notice
announcing the receipt of the notice of
intent to audit within thirty (30) days of

the filing of the notice. The notification of intent to audit shall be served at the same time on the Designated Agent to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) Acquisition and retention of records. The Designated Agent making the royalty payment shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than three (3) years. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than three (3)

(e) Acceptable verification procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and qualified auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Designated Agent being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Designated Agent reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.*The Copyright Owner or Performer

requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of ten percent (10%) or more, in which case the Designated Agent shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure; Provided, however, that a Designated Agent shall not have to pay any costs of the verification procedure in excess of the amount of any underpayment unless the underpayment was more than twenty percent (20%) of the amount finally determined to be due from the Designated Agent and more than \$5,000.00.

## § 261.8 Unclaimed funds.

If a Designated Agent is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty payment under this part, the Designated Agent shall retain the required payment in a segregated trust account for a period of three (3) years from the date of payment. No claim to such payment shall be valid after the expiration of the three (3) year period. After the expiration of this period, the unclaimed funds of the Designated Agent may first be applied to the costs directly attributable to the administration of the royalty payments due such unidentified Copyright Owners and Performers and shall thereafter be allocated on a pro rata basis among the Designated Agents(s) to be used to offset such Designated Agent(s) other costs of collection and distribution of the royalty fees.

Dated: June 20, 2002.

Marybeth Peters,

Register of Copyrights.

James H. Billington,

The Librarian of Congress.

[FR Doc. 02-16730 Filed 7-5-02; 8:45 am]

BILLING CODE 1410-33-P

(OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM, Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have

National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program

provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 et seq.).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C 601 et seq.). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Unfunded Mandates

OSM has determined and certifles pursuant to the Unfunded Mandates Reform Act (2 U.S.C. 1502 et seq.) that this rule will not impose a cost of \$100 million or more in any given year on local, state, or tribal governments or private entities.

#### List of Subjects in 30 CFR Part 918

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 28, 1997.

#### Brent Wahlouist.

Regional Director, Mid-Continent Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR Part 918 is amended as set forth below:

#### PART 918-LOUISIANA

1. The authority citation for Part 918 continues to read as follows:

Authority: 30 U.S.C. 1201 et seq.

2. Section 918.15 is amended in the table by adding a new entry in chronological order by "Date of final publication" to read as follows:

§918.15 Approval of Louisiana regulatory program amendments.

Original amendment submission

Date of final publication

Citation/description

October 24, 1997 ..... May 8, 1998 ......

Sections 105; 2537.A.11.; 2725.A., A.2., A.3., A.3.a., C.1., F; 2907.C.5.; 3705.A.2., A.2a., A.2b.; 3711.A., B.1. through B.6.; 3717.A., A.2., A.3.; 4501.A.3., A.4.; 5333.A.1. through A.13.; 5411.A.; 5413.A.; 5503.A.2.; 5507.A.4.; 6507.A.2.; 6913 B.; 6915.B.1.; 6917.A.; 7105.C.

[FR Doc. 98-12249 Filed 5-7-98; 8:45 am] BILLING CODE 4310-05-M

## LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 260

[Docket No. 96-5 CARP DSTRA]

**Determination of Reasonable Rates** and Terms for the Digital Performance of Sound Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule and order.

summary: The Librarian of Congress, upon recommendation of the Register of Copyrights, is announcing the determination of the reasonable rates and terms for the compulsory license permitting certain digital performances of sound recordings.

EFFECTIVE DATE: May 8, 1998.

ADDRESS(ES): The full text of the public version of the Copyright Arbitration Royalty Panel's report to the Librarian of Congress is available for inspection and copying during normal working hours in the Office of the General Counsel, James Madison Building, Room LM-403, First and Independence Avenue, SE., Washington, DC, 20540.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya Sandros, Attorney Advisor, Copyright Arbitration Royalty Panel (CARP), PO Box 70977, Southwest

Station, Washington, D.C. 20024. Telephone (202) 707-8380. Telefax: (202) 707-8366.

## SUPPLEMENTARY INFORMATION:

#### I. Background

The Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA), Public Law 104-39, 109 Stat. 336, amended section 106 of the Copyright Act, title 17 of the United States Code, to give sound recording copyright owners an exclusive right, subject to certain limitations, to perform publicly sound recordings by digital audio transmissions. 17 U.S.C. 114. The bill affords certain digital transmission

services a compulsory license to perform digital sound recordings publicly. The purpose of the bill is "to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters." S. Rep. No. 104–128, at 15 (1995).

All non-exempt digital subscription transmission services are eligible for the statutory license, provided that they are non-interactive and comply with the terms of the license. The statute requires that the service not violate the "sound recording performance complement," 1 not publish in advance a schedule of the programming to be performed, not cause any receiving device to switch from one program channel to another, include in each transmission certain identifying information encoded in each sound recording, pay the royalty fees and comply with the associated terms, and comply with any recordkeeping requirements promulgated by the Copyright Office. 2 17 U.S.C. 114(d)(2)(A)-(E) and 114(f)(2)-(5).

The reasonable terms and rates of the section 114 statutory license are determined by voluntary negotiations among the parties and, where necessary, compulsory arbitration conducted under chapter 8 of the Copyright Act, title 17. 17 U.S.C. 114(f).

## II. The CARP Proceeding To Set Reasonable Rates and Terms

On December 1, 1995, the Librarian of Congress (Librarian) initiated the statutorily mandated six month

<sup>1</sup> (7) The "sound recording performance complement" is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

(B) 4 different selections of sound recordings—(i) By the same featured recording artist; or

(ii) From any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States, if no more than three such selections are transmitted consecutively: Provided, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

17 U.S.C. 114(j)(7).

<sup>2</sup> See Notice of Proposed Rulemaking, 61 FR 22004 (May 13, 1996); Notice of Proposed Rulemaking, 62 FR 34035 (June 24, 1997).

negotiation period within 30 days of the enactment of the DPRSRA, pursuant to section 114(f)(1) of the Copyright Act, with the publication of a notice initiating the voluntary negotiation process for determining reasonable terms and rates of royalty payments. See 60 FR 61655 (December 1, 1995). In the notice, the Library instructed those parties with a significant interest in the establishment of the reasonable terms and rates for the section 114 license to file a petition with the Copyright Office no later than August 1, 1996, in the event that the interested parties were unable to negotiate an agreement. Id.

Accordingly, the Recording Industry Association of America (RIAA) filed a petition with the Copyright Office in which it asked the Office to initiate an arbitration proceeding pursuant to chapter 8 of the Copyright Act. After making a determination that the petitioner RIAA had a significant interest in the proposed CARP proceeding, the Librarian published a notice setting the schedule for the 45day precontroversy discovery period and announcing the date for the initiation of the 180-day arbitration period. 61 FR 40464 (August 2, 1996). The exchange of documents during the precontroversy discovery period did not proceed smoothly, requiring the Office to reschedule portions of the discovery period and vacate the scheduled date for the initiation of the CARP. See Order in Docket No. 96-5 CARP DSTRA (September 18, 1996); Order in Docket No. 96-5 CARP DSTRA (November 27, 1996). The Librarian announced the initiation of the 180-day arbitration period following the conclusion of the discovery period and the resolution of all pending motions. 62 FR 29742 (June 2, 1997).

#### The Parties

There are four parties to this proceeding: three digital audio subscription services (the Services) and the Recording Industry Association of America (RIAA).

1. The Recording Industry Association of America, Inc. (RIAA)—RIAA represents a collective, consisting of more than 275 record labels, established for the express purpose of administering the rights of these sound recording copyright owners. RIAA represents the interests of its members who are the copyright owners of more than 90% of all legitimate sound recordings sold in the United States. Record companies own the copyrights in the sound recordings.

2. Digital Cable Radio Associates (DCR)—A digital audio service

established in the United States in 1987 by the Jerrold Communications Division of General Instrument Corporation. Current partners include Warner Music, Sony Corporation, EMI, Time Warner Cable, Continental Cablevision, Comcast Cable, Cox Cable, and Adelphia Cable.

- 3. Digital Music Express, Inc. (DMX)—A digital music subscription service established in 1986 as International Cablecasting Technologies, Inc. In 1997, DMX merged into TCI Music, Inc., a publicly traded company with approximately 80% of its shares held by TCI, Inc.
- 4. Muzak, L.P.—With roots dating back to 1922, Muzak is America's oldest background music provider for businesses. In the 1920s and 1930s, Muzak was part of the consumer music market until driven out of that market by the growing popularity of radio. Muzak remained out of the market until March, 1996, when it began providing 27 channels of digital music under the name DiSHCD, as part of Echostar's satellite-based DiSH Network.

The Position of the Parties at the Commencement of the Proceeding

RIAA, representing the interests of the sound recording copyright owners, requested a royalty rate set at 41.5% of a Service's gross revenues resulting from U.S. residential subscribers, or in some circumstances, a flat rate minimum fee. Report of the Copyright Arbitration Royalty Panel (Report) ¶ 33. RIAA also agreed to be named the single entity to collect, administer, and distribute the royalty fees. Report ¶ 184. RIAA proposed additional terms concerning the timing of payments, statements of accounts, retention of records, and audits. Report ¶ 33.

The three digital audio subscription services requested a royalty rate ranging from a low of 0.5% to a high of 2.0% of gross revenues resulting from U.S. residential subscribers, and unanimously opposed a flat rate minimum fee. Report ¶¶ 34–36, 172. The Services proposed that a single private entity or a government agency be named for purposes of administering the royalty fees, but proposed submitting payments on a quarterly basis rather than a monthly basis. Report ¶¶ 184– 185. In addition, the Services proposed terms concerning recordkeeping and audits, confidentiality of business records, and payment terms for distributing license fees among featured artists and nonfeatured musicians and vocalists.

The Panel's Determination of a Reasonable Rate

The Panel evaluated the four statutory objectives, 3 and their component parts, in light of the evidence and determined that the digital audio subscription services should pay a royalty fee of 5% of gross revenues resulting from U.S. residential subscribers. Report ¶¶ 196, 200. This rate represents the midpoint of the range of possible license rates that the Panel considered appropriate (but not the midpoint of the parties' proposals). The Panel further concluded that there was no reason to impose a minimum license fee on the Services at this point, and consequently, it rejected RIAA's proposal to set a minimum fee based on a flat rate. Report ¶ 204.

In making this determination, the Panel followed the precedent set in prior rate adjustment proceedings conducted by the former Copyright Royalty Tribunal and other CARP panels which, as a first step, determined a range of possible rates after considering different proposed rates based on negotiated licenses or analogous marketplace models. Report ¶ 123. See also, 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884 (January 5, 1981), and the 1997 Rate Adjustment of the Satellite Carrier Compulsory License Fees, 62 FR 55742 (October 28, 1997). Each party offering a "benchmark" rate contends that the rate it offers represents the cost for similar products in analogous markets. The Panel considered three benchmarks, weighing each in light of the record evidence to determine whether the proposed models shed light on how the marketplace would value a performance license in sound recordings. Once the Panel identified the useful models, it used the corresponding rate information

to craft a range of potential royalty rates for the section 114 license, then chose the rate within the range which would further the stated statutory objectives.

RIAA and the Services proposed rates based on three distinct marketplace models in which rates are set through arms-length negotiations. Report ¶ 124. The Services proposed two benchmarks for consideration by the Panel: Negotiated license fees for a sound recording performance right and the license fees the Services pay the performing rights organizations for use of the underlying musical works. RIAA put forth a single model for the Panel's consideration: Cable television network license fees. The Panel found the Services' models helpful in setting the rate for the digital performance right, but rejected the RIAA model for the reasons stated herein.

Both RIAA and the Services seemed to agree that the best proxy for reasonable compensation is a marketplace rate. The Panel, however, noted that the DPRSRA instructs the CARP to set reasonable rates, which need not be the same as rates set in a marketplace unconstrained by a compulsory license. In support of its interpretation, the Panel cited the statutory factors which must be considered in setting the rate. See Report ¶¶ 10, 124.

The Panel's Evaluation of the RIAA Benchmark

The benchmark proposed by the recording industry analogizes the cost of programming for cable television networks with the cost of procuring the right to perform the sound recordings. The analogy, however, did not withstand scrutiny by the Panel, which reasonably found that the cable television network license fees model did not represent rates for an analogous product in a comparable marketplace. Its conclusion rested on a number of findings which described analytical deficiencies in the two studies offered in support of the 41.5% proposed royalty rate. Report ¶¶ 126-150.

The RIAA model proposed using the purchase price of programming for cable television networks to determine the price the Services would pay for the right to publicly perform sound recordings, if negotiated in a free market. RIAA's Proposed Findings of Fact and Conclusions of Law (PF) ¶ 62; RIAA Proposed Conclusions (PC) ¶ 18. RIAA presented two studies that illustrate the amount of money cable television networks pay for their

programming: (1) The Kagan study,<sup>4</sup> and (2) the Wilkofsky Gruen Associates<sup>5</sup> study. RIAA Exhibits (Exs.) 14 and 15, respectively. Both studies argued that the analogy between cable television networks and the digital audio services was apt because the digital audio services and the cable television networks compete head-to-head for carriage on cable and DBS systems, and for consumer time and discretionary income. Report ¶ 130.

The Kagan study analyzed data concerning the revenues and programming expenses of 31 basic cable television networks from the 1985-96 period. It concluded that a cable television network spends, on average, approximately 40% of its gross revenues for programming. RIAA Exhibit (Ex.) 14 at 7. The Panel, however, discounted the 40% figure because it represented the costs of license fees to all copyright owners, and it included the costs of programming during the start-up years, when a new cable television network may pay more than 100% of its revenues in programming costs. Report ¶¶ 127, 129, 149. Failure to adjust for these factors made it impossible for the Panel to assess the costs for the right to publicly perform the sound recordings apart from the costs of the other copyrighted works which make up the program.

Their second study, prepared by Wilkofsky Gruen Associates (WGA), analyzed only cable movie networks because Wilkofsky, the expert for the study, claimed that the "pricing characteristics and dynamics" of the cable movie networks were comparable in three fundamental ways: The lack of commercials, the generation of revenues through subscriptions, and the purchase of programming from third parties. Wilkofsky Written Direct Testimony (W.D.T.) at 3-5. This study concluded that the cable movie networks pay a weighted average of 41.5 % of their revenues for programming that they acquire from outside sources and by analogy, the Services should pay the same. Id. at 3.

The Panel rejected the conclusion of the WGA study because it ignored the following fundamental differences in market demand and cost characteristics between the cable movie networks and the digital audio services. Report ¶¶ 133–145.

<sup>&</sup>lt;sup>3</sup> (I) to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 114, 115, and 116, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118. The rates applicable under section 114, 115, and 116 shall be calculated to achieve the following objectives:

<sup>(</sup>A) To maximize the availability of creative works to the public;

<sup>(</sup>B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

<sup>(</sup>C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

<sup>(</sup>D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. 801(b)(1).

<sup>&</sup>lt;sup>4</sup>The Kagan study was prepared by Paul Kagan Associates, a media research company that tracks and publishes financial data concerning the media and entertainment industries.

<sup>&</sup>lt;sup>5</sup> Wilkofsky Gruen Associates is an economic consulting firm that specializes in the communications and entertainment industries.

- 1. The study provided no evidence to show that any of the movie networks directly compete with digital audio services. In fact, when people watch a movie, they devote their entire attention to the film for a period of time, and generally, do not repeat the experience with the same movie. On the other hand, subscribers to digital audio services choose to listen to the same music again and again while engaged in other activities. In other words, the subscriber chooses each service for different reasons, and therefore, they do not represent choices in the same market. Report ¶¶ 143, citing Rosenthal Written Rubuttal Testimony (W.R.T). at 13, Transcript (Tr). 1251 (Rubinstein).
- 2. The cable movie networks compete against other cable and broadcast stations for exclusive rights to motion pictures. Exclusive rights are highly prized, and consequently, command a premium price, but they are not implicated in the market for digital audio transmissions. Consequently, the Panel found that RIAA's failure to adjust for this aspect grossly overstated the value of programming costs in its cable movie network analogy. Report ¶¶ 137–142.
- 3. The Panel further discounted the analogy because RIAA ignored the promotional benefit that flows to the record companies from the constant airplay of their sound recordings. Report ¶¶ 144–145. See also discussion infra.

## The Panel's Determination of Reasonable Terms

In addition to establishing a reasonable rate for the sound recording performance license, the Panel must also establish reasonable terms for implementing the license. The Senate Committee Report makes clear that terms include "such details as how payments are to be made, when, and other accounting matters." S. Rep. No. 104–128, at 30 (1995).

RIAA and the Services proposed specific terms concerning minimal fees, payment schedules, late fees, statements of account, and audits. From these, the Panel adopted the following terms:

- 1. RIAA shall have sole responsibility for the distribution of the royalty fees to all copyright holders. Report ¶¶ 184, 205.
- 2. The license fee payments shall be due on the twentieth day after the end of each month, beginning with the month succeeding the month in which the royalty fees are set. Report ¶¶ 185, 206.
- 3. The Services shall make back payments over a 30-month period. The first back payment, 1/30th of the total

arrearage, shall be delayed for six months. Report ¶¶ 187, 206(a).

4. A Service shall be subject to copyright liability if it fails to make timely payments. Liability for copyright infringement shall only come about for knowing and willful acts which materially breach the statutory license terms. Report ¶¶ 188, 206(b).

5. A late fee of 1.5% per month or the highest lawful rate, whichever is lower, will be imposed from the due date until payment is received. Report ¶¶ 189,

206(a).

6. Services shall submit monthly statements of accounts and payment to RIAA. Only information to verify the royalty payments need be provided on the monthly statements of account.

Report ¶¶ 190, 205, 207.

7. Safeguards must be established to protect against disclosure of confidential financial and business information, which includes the amount of the royalty payment. Access to this information shall be limited to employees of RIAA, who are not employees or officers of the copyright owners or the recording artists, for the purpose of performing their assigned duties during the ordinary course of employment, and to independent auditors acting on behalf of RIAA. Report ¶¶ 191, 208.

8. The digital audio services shall maintain accurate records on matters directly related to the payment of the license fees for a period of three years.

Report ¶¶ 192, 209.

9. Interested parties may conduct only one audit of a digital audio service during any given year. Report ¶¶ 193, 210(c).

• Interested parties must file a Notice of Intent to Conduct an Audit with the Copyright Office. Such notice shall be published in the Federal Register. Report ¶¶ 193, 210(a)–(b).

 RIAA must retain an auditor's report for a period of three years. Report

¶¶ 193, 210(d).

• An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent auditor, may serve as an audit for all interested parties. Report ¶¶ 194, 210(e).

• Interested parties shall pay for the cost of the audit, unless an independent auditor concludes that there was an underpayment of five (5) percent or more. Report ¶¶ 195, 210(f).

more. Report ¶¶195, 210(f).

The Panel chose not to adopt RIAA's minimum fee proposal and the Services' proposed payment schedule for the distribution of royalties to the featured artists and the nonfeatured musicians and vocalists. The Panel found that the

timing of payments to the performing artists was not within the scope of the proceeding. Report § 204; Report at 56 n.21.

The Panel's Evaluation of the RIAA Proposal To Adopt a Minimum Fee

RIAA proposed the imposition of a minimum fee as a means to insure a fair return to the copyright owners in light of business practices that might erode the value of the statutory license fee. RIAA PF ¶¶ 126-147. Specifically, RIAA sought a minimum fee to minimize the effect of discounts or credits, to address shifts in business models, and to avoid diluting the value of the sound recording when audio digital services add new channels to their offerings. Id. The Panel ultimately rejected this suggestion because it found that the rationale for a minimum fee was based on unsupported speculation about the business structure of the Services. Report ¶ 204.

## III. The Parties' Reaction to the Determination of the Panel

The regulations governing the CARP proceedings allow parties to file petitions to modify or set aside the determination of the Panel within 14 days of its filing date. The petition must state the reasons for the petition, including relevant references to the parties' proposed findings of fact and conclusions of law. Parties who wish to file replies to a petition may do so within 14 days of the filing of such petition. See 37 CFR 251.55(a), (b).

Accordingly, on December 12, 1997, RIAA filed a Petition to Reject the Report of the CARP (Petition), contending that the Panel acted both contrary to the Copyright Act and arbitrarily in reaching its determination. In its petition, RIAA requests the Librarian to set aside the Panel's determination and set a new rate that should not be less than double the Services' 1996–2001 payments for the public performance of the underlying musical works.

RIAA contends that the Panel's determination was arbitrary and contrary to law for the following reasons:

1. The Panel disregarded precedent set by the former Copyright Royalty Tribunal (CRT or Tribunal) in applying the statutory criteria for determining a reasonable rate for the public performance right. Petition at 6, 14–15.

2. The Panel used the rates set in a corporate partnership agreement as a benchmark for establishing the new compulsory license rate. This was inappropriate because the public performance in sound recordings

license agreement was not negotiated independently, but as part of a larger complex agreement. *Id.* at 20–27.

- 3. When the Services publicly perform a sound recording, two groups of copyright owners receive royalties: The copyright owners in the underlying musical works, and for the first time, the record companies and performers. The Panel determined that the record companies and performers were not entitled to more royalties for their public performance right than those received by the copyright owners in the underlying musical works for the public performance of their works. RIAA contends that CRT precedent supports a determination that just the reverse is true. Id. at 14-15.
- 4. The compulsory license allows the Services to perform sound recordings publicly without infringing copyright prior to the setting of the royalty rate, so long as the Services agree to pay their accumulated royalty obligation once the rates are determined. The Panel created a payment schedule that allows the Services to pay these fees over a three year period. RIAA contends that this payment schedule is contrary to law. *Id.* at 7 n.1.
- 5. RIAA also contends that the CARP failed to provide a reasoned explanation for proper review, made conclusions inconsistent with its findings, made findings without record support, and failed to make findings in support of conclusions. *Id.* at 2.

RIAA, however, does not suggest that the Librarian disregard all the findings of the Panel. Instead, it recommends adopting the Panel's approach "to determine a reasonable rate-provided that the Librarian makes the necessary adjustments to account for the precedent and considerations that the Panel ignored." Petition at 51-52. RIAA further allows that the Librarian need not consider the cable network benchmark in its analysis, since the Panel's analysis of the remaining benchmarks supports an upward adjustment of the 5% rate of gross revenues set by the CARP. Petition at 52

On December 29, 1997, in response to the RIAA petition to reject the CARP report, the Services filed a reply to RIAA's Petition to Reject the CARP Report (Reply to Petition). The crux of the Services' argument in support of adopting the Panel's report is that "[w]hen examined as a whole, the Panel's Report is eminently reasonable and amply supported by the record." Reply to Petition at 12. Specific arguments of the Services in support of the Panel's report are discussed below

in conjunction with RIAA's arguments to reject the report.

# IV. The Librarian's Scope of Review of the Panel's Report

The Copyright Royalty Tribunal Reform Act of 1993 (the Reform Act), Public Law 103-198, 107 Stat. 2304, created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable. but the Reform Act created two layers of review that result in final orders: the Librarian of Congress (Librarian) and the United States Court of Appeals for the District of Columbia Circuit. Section 802(f) of title 17 directs the Librarian either to accept the decision of the CARP or to reject it. If the Librarian rejects it, he must substitute his own determination "after full examination of the record created in the arbitration proceeding." 17 U.S.C. 802(f). If the Librarian accepts it, then the determination of the CARP becomes the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that will be subject to review by the Court of Appeals. 17 U.S.C. 802(g)

The review process has been thoroughly discussed in prior recommendations of the Register of Copyrights (Register) concerning rate adjustments and royalty distribution proceedings. Nevertheless, the discussion merits repetition because of its importance in reviewing each CARP decision.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." Neither the Reform Act nor its legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is any different from the "arbitrary" standard described in the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A).

Review of the case law applying the APA "arbitrary" standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency action is generally considered to be arbitrary when:

1. It relies on factors that Congress did not intend it to consider;

2. It fails to consider entirely an important aspect of the problem that it was solving;

3. It offers an explanation for its decision that runs counter to the evidence presented before it;

4. It issues a decision that is so implausible that it cannot be explained

as a product of agency expertise or a difference of viewpoint;

5. It fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and

6. Its action entails the unexplained discrimination or disparate treatment of similarly situated parties.

Motor Vehicle Mfrs. Ass'n. State Farm Mutual Auto. Insurance Co., 463 U.S. 29 (1983):

Celcom Communications Corp. v. FCC, 789 F.2d 67 (D.C. Cir. 1986); Airmark Corp. v. FAA, 758 F.2d 685 (D.C. Cir. 1985).

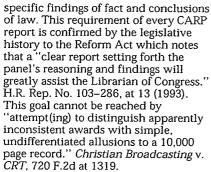
Given these guidelines for determining when a determination is "arbitrary," prior decisions of the District of Columbia Circuit reviewing the determinations of the former CRT have been consulted. The decisions of the Tribunal were reviewed under the "arbitrary and capricious" standard of 5 U.S.C. 706(2)(A) which, as noted above, appears to be applicable to the Librarian's review of the CARP's decision.

Review of judicial decisions regarding Tribunal actions reveals a consistent theme: while the Tribunal was granted a relatively wide "zone of reasonableness," it was required to articulate clearly the rationale for its award of royalties to each claimant. See National Ass'n of Broadcasters v Copyright Royalty Tribunal, 772 F.2d 922 (D.C. Cir. 1985), cert. denied, 475 U.S. 1035 (1986) (NAB v. CRT); Christian Broadcasting Network v. Copyright Royalty Tribunal, 720 F.2d 1295 (D.C. Cir. 1983) (Christian Broadcasting v. CRT); National Cable Television Ass'n v. Copyright Royalty Tribunal, 689 F.2d 1077 (D.C. Cir. 1982) (NCTA v. CRT); Recording Indus. Ass'n of America v. Copyright Royalty Tribunal, 662 F.2d 1 (D.C. Čir. 1981) (RIAA v. CRT). As the D.C. Circuit succinctly noted:

We wish to emphasize \* \* \* that precisely because of the technical and discretionary nature of the Tribunal's work, we must especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully \* \* \*.

Christian Broadcasting v. CRT, 720 F.2d at 1319 (D.C. Cir. 1983), quoting NCTA v. CRT, 689 F.2d at 1091 (D.C. Cir. 1982).

Because the Librarian is reviewing the CARP decision under the same "arbitrary" standard used by the courts to review the Tribunal, he must be presented by the CARP with a rational analysis of its decision, setting forth



It is the task of the Register to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination. 17 U.S.C. 802(f).

# V. Review and Recommendation of the Register of Copyrights

The law gives the Register the responsibility to review the CARP report and make recommendations to the Librarian whether to adopt or reject the Panel's determination. In doing so, she reviews the Panel's report, the parties' post-panel motions, and the record evidence.

After carefully reviewing the Panel's report and the record in this proceeding, the Register finds that the Panel's adoption of the DCR negotiated license fee as the starting point for making its determination is arbitrary. This conclusion compels the Register to set aside the Panel's final determination and reevaluate the record evidence before making a recommendation to the Librarian.

Section 802(f) states that "(i)f the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be." During that 60-day period, the Register reviewed the Panel's report and made a recommendation to the Librarian not to accept the Panel's report, for the reasons cited herein. The Librarian accepted this recommendation, and on January 27, 1998, issued an order stating that the Panel's report was still under review. See Order, Docket No. 96-5 CARP DSTRA (January 27, 1998).

The full review of the Register and her corresponding recommendations is presented herein. Within the limited scope of the Librarian's review of this proceeding, "the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its

decision runs completely counter to the evidence presented to it." Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55757 (1997), citing 61 FR 55663 (October 28, 1996) (Distribution of 1990, 1991 and 1992 Cable Royalties). Accordingly, the Register accepts the Panel's weighing of the evidence and will not question findings and conclusions which proceed directly from the arbitrators' consideration of factual evidence.

The Register also adopts the Panel's approach in setting reasonable rates and terms for the digital performance license in sound recordings pursuant to 17 U.S.C. 114(f)(2), but sets aside those findings and conclusions that are arbitrary or contrary to law.

#### a. Methodology for Making Rate Determination

Use of a Marketplace Standard in Setting the Royalty Rate

The standard for setting the royalty rate for the performance of a sound recording by a digital audio subscription service is not fair market value, although CARPs and the Copyright Royalty Tribunal (CRT or Tribunal) in prior rate adjustment proceedings under sections 115 and 116 considered comparable rates negotiated under marketplace conditions when making their determinations.

In light of this practice, the Panel followed the same approach established in prior rate adjustment proceedings conducted by the Tribunal and the CARPs in making its determination. Namely, the Panel considered the parties' presentations of different rates negotiated in comparable marketplace transactions and first determined whether the proposed models mirrored the potential market transactions which would take place to set rates for the digital performance of sound recordings. Report ¶ 123. These benchmarks were then evaluated in light of the statutory objectives to determine a reasonable royalty rate. Id.

The Panel noted that RIAA and the Services "seem to agree that the best proxy for reasonable compensation is to look to marketplace rates." Report ¶ 124. The parties also agreed that the rates should be based on gross revenues and further agreed on the definition of "gross revenues." Report ¶ 125; RIAA PF ¶ 55; Services Joint Reply to RIAA's Proposed Findings of Fact and Conclusions of Law (Services' RF) ¶ 51.

While the Panel agreed with the parties on these two points, it noted that the statute requires the Panel to adopt reasonable rates and terms, and that reasonable rates and terms are not

synonymous with marketplace rates. Report ¶ 124. Unlike a marketplace rate which represents the negotiated price a willing buyer will pay a willing seller, see Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55742 (1997) (applying a fair market standard, as set forth at 17 U.S.C. 119(c)(3)(D), in setting royalty rates for the retransmission of broadcast signals by satellite carriers), reasonable rates are determined based on policy considerations. See RIAA v. CRT, 662 F.2d 1.6 Congress granted the record companies a limited performance right in sound recordings in order to "provide [them] with the ability to control the distribution of their product by digital transmissions," but it did so with the understanding that the emergence of new technologies would not be hampered. S. Rep. No. 104-128, at 15 (1995). Consequently, Congress specified that the terms were to be reasonable and calculated to achieve the following four specific policy objectives:

- 1. To maximize the availability of creative works to the public;
- 2. To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
- 3. To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and
- 4. To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. 17 U.S.C. 114(f)(2) and 801(b)(1).

RIAA takes exception to this interpretation and argues that the Panel failed to follow CRT precedent that "interpreted the Section 801(b)(1) factors as requiring it to establish a market rate." Petition at 33. In support of its position, RIAA relies upon the 1982 CRT rate adjustment proceeding to determine reasonable rates and terms for the statutory noncommercial broadcasting license, 17 U.S.C. 118, where the CRT stated:

The Tribunal has consistently held that the Copyright Act does not contemplate the Tribunal establishing rates below the

<sup>6</sup> In reviewing how the Tribunal analyzed the statutory criteria, the court noted that "other statutory criteria invite the Tribunal to exercise a legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users." Id. at 8.

reasonable market value of the copyrighted works subject to a compulsory license.

1982 Adjustment of Royalty Schedule for Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting: Terms and Rates of Royalty Payments, 47 FR 57924 (December 29, 1982). RIAA further contends that the Panel not only ignored the CRT precedent requiring it to set marketplace rates, but improperly shifted the emphasis to ensure the financial viability of the copyright users. Petition at 33.

In response, the Services contend that the Panel's analysis comports with CRT precedent on both points, noting that the CRT did consider evidence on how a proposed rate would affect the user industry in its proceedings to set rates under sections 111 and 116. Reply to Petition at 26. For example, in the 1980 rate adjustment proceeding to set the royalty rate for jukeboxes, the CRT considered the evidence and found only that marginal jukebox owners would be threatened by the new rate." Id. In fact, the Tribunal stated that it was "satisfied that adequate attention (had) been given to the small operator, \* (and adopted) an amendment to the proposed fee schedule that was proposed for the benefit of such (small) operators." 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 888 (1981).

The Register finds that the Panel correctly analyzed how to determine a reasonable rate under section 114. Section 801(b)(1) states that one function of a CARP is to determine reasonable rates "as provided in sections 114, 115, and 116, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118." The provision further states that the CARP must determine the rates under sections 114, 115, and 116 to achieve the four statutory objectives. The law does not state that these objectives are applicable in a rate adjustment proceeding to determine rates under sections 111 or 118. Therefore, RIAA's reliance on CRT precedents for setting rates under section 118 is without merit. Furthermore, the Panel's analysis is consistent with the prior CRT determinations establishing rates for the section 115 and 116 licenses.

In the 1980 jukebox rate adjustment proceeding, the CRT set the rate "[o]n the basis of the marketplace analogies presented during the proceeding, taking the record as a whole, and with regard for the statutory criteria. \* \* \* That rate takes account both of what is paid for music elsewhere under similar

circumstances and, since it is a flat rate, of the Tribunal's concern for the smaller, less profitable operators." 46 FR 889 (1981). To recognize that this rate was not a negotiated marketplace value, one need only read Commissioner James's dissent admonishing the majority for setting a rate on "an ability to pay theory." He characterized the majority's actions as follows:

In essence, the majority reached a conclusion on the premise that a true market value would result in too large an increase in fees. The majority was set on course by what they deemed were the guiding standards of the statute which referred to minimizing the disruptive impact on the economic structure of the industries involved. It was the majority view and opinion that a large increase in fees would be oppressive to the industry and would "impact on small operators."

Id. at 891 (footnote omitted).

The Court of Appeals upheld the
Tribunal's approach in its 1980 jukebox
rate adjustment proceeding, stating that:

In its decision, the Tribunal acknowledged that the rate which it approved could not be directly linked to marketplace parallels, but it found that such parallels served as appropriate points of reference to be weighed together with the entire record and the statutory criteria. Although we agree with ASCAP that the analogous marketplace evidence is significant, we do not believe that the Tribunal was bound by that evidence to select a fee rate within the \$70-\$140 "zone" which, according to ASCAP, governs this case. The Tribunal carefully weighed the evidence derived from the marketplace analogies and other evidence specifically in light of the four statutory criteria of section 801(b) and arrived at a royalty rate for coinoperated phonorecord players of \$50 per machine.

Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal, 676 F.2d 1144, 1157 (7th Cir. 1982), cert. denied, 459 U.S. 907 (1982) (AMOA v. CRT). The D.C. Court of Appeals engaged in a similar analysis when it considered the Tribunal's determination to raise the royalty rate for making and distributing phonorecords of copyrighted musical works from 2 cents to 4 cents. In that case, the copyright owners argued that Congress intended the Tribunal to set a high royalty rate under a bargaining room theory, which would create a rate ceiling for stimulating future negotiations outside the license. The D.C. Circuit found that while Congress had considered this possibility, it chose not to codify this approach, but rather to express its will through specific statutory criteria and allow the Tribunal to interpret and apply these objectives to the record evidence in a rate adjustment proceeding. RIAA v. CRT,

662 F.2d at 8–9. Furthermore, the Court ascertained that Congress did not rank the criteria in order of importance so that the Tribunal, and subsequently, the CARP, could:

To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, \* \* \* choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a "zone of reasonableness."

Id. at 9. See also Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968); Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 585–586 (1942); Hercules, Inc. v. Environmental Protection Agency, 598 F.2d 91, 107 (D.C. Cir. 1978).

#### b. Benchmarks

The Panel's Disposition of the Proposed Benchmarks

The Register has reviewed the analysis of the Panel and its disposition of the three benchmarks and finds that the Panel's primary reliance on and manipulation of the DCR negotiated license fee was arbitrary. The Register also finds that the record evidence does not support the Panel's calculation of a specific range of fees for the public performance of the musical compositions. These flaws compel the Register to reexamine the record evidence and propose a rate based on her analysis while providing deference, where appropriate, to the findings of the Panel.

The Register, however, did not evaluate further the record evidence concerning either the cable television network fee or the proposed minimum fee in her deliberations to determine the appropriate rate because no party to the proceeding challenged either of these findings or continued to rely upon these matters in presenting its arguments to the Librarian.7 Therefore, the Register forgoes a review of the Panel's analysis in these areas. This does not mean, however, that the Register and the Librarian will always forego an independent review of a Panel's actions. See, e.g. Distribution of the 1992, 1993, and 1994 Musical Works Funds, 62 FR 6558 (February 12, 1997)

<sup>7 &</sup>quot;RIAA strongly disagrees with the CARP's conclusion that the Services should devote a smaller percentage of their revenues to license fees than do other cable networks. While the range of percentages is large, there are no cable networks that consistently spend as little as 5 percent. Nevertheless, RIAA has not challenged the CARP's decision to reject the cable network analogy." Petition at 52 n.9 (citations omitted). Furthermore, RIAA did not raise any challenge to the Panel's decision not to grant a minimum fee.

(recommending an upward adjustment to one party's award, although no party made a request for the adjustment); Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55742 (1997) (recommending the adoption of a zero rate for local retransmission of network signals to unserved households).

The Panel's Adoption of the DCR Negotiated License Fee and its Subsequent Manipulations of This Rate to Establish a Range of Potential Royalty Rates was Arbitrary<sup>8</sup>

The Panel found that the digital performance license negotiated as part of a larger partnership agreement between DCR and its two record company partners, Warner Music and Sony Music, was a useful benchmark for determining the section 114 royalty fee because it provided a "useful precedent," although there were problems with using the rate for this license fee since only 60% of the industry engaged in the negotiations setting the rate.9 Report ¶¶ 166, 200. To address this problem the panel adjusted the figure upward to reach a base rate figure arguably applicable to 100% of the recording industry market. Id. The Panel then doubled this number to account for the statutory provision which requires an equal distribution of the royalties collected pursuant to the compulsory license between the record companies and the recording artists. Id.; also 17 U.S.C. 114(g). While recognizing that a pure doubling of the base rate was inappropriate, the Panel determined that these manipulations of a "freely negotiated rate" set a reasonable range of rates for further consideration in light of the statutory criteria. Id.

RIAA opposes the use of the negotiated license fee as a benchmark for setting the compulsory license fee for the following reasons: (1) It was merely one provision in a complex transaction involving eleven interrelated agreements, RIAA PF ¶ 92; Petition at 22; Wildman <sup>10</sup> W.R.T. at 12–15; Transcript (Tr.) 2213–14 (Wildman); (2) the record companies interested in

investing in the digital audio service would share the cost of a higher rate, thereby creating a strong incentive to create a low rate; (3) the license fee was not for the right to perform sound recordings publicly, but for the acknowledgement that a right should exist, RIAA PF ¶ 84; Tr. 2102 (Vidich); 11 (4) the record companies never viewed the established rate as precedential, citing the license provision that the rate will be superseded if Congress establishes a performance right in sound recordings, DCR Exs. 7, 8 & 15 at ¶ 9; Vidich W.R.T. at 7; Tr. 2106-2107 (Vidich); Del Beccaro 12 W.D.T. at 9, and the most favored nations clause, DCR Exs. 7, 8 & 15 at ¶ 6; (5) the record companies did not enjoy the degree of leverage in setting the rate that the Services imply in their proposed findings; (6) the fee did not represent an industry-wide agreement on the value of the performance right; instead, only three record companies, "collectively responsible for only about 35% of the sound recordings performed by DCR,' negotiated the rates, RIAA's Reply to Proposed Findings and Conclusions of Law (RIAA RPF) 39; Tr. 1014 (McCarthy); 13 and (7) the DCR digital performance license differed in significant ways from the statutory license. For example, the DCR license requires the company to pay royalties on its revenues from international sources which are not recoverable under the DPRSRA, RIAA PF  $\P$  83; Tr. 965 (Del Beccaro); Tr. 1014 (McCarthy); Tr. 2137 (Vidich), and it did not contemplate a distribution of a portion of the royalties to recording artists as required under the new law, RIAA PF ¶ 82.

In response, the Services assert that the Panel "did not rely on the DCR license rate in isolation," and argue that its determination was informed by testimony from the parties who participated in the negotiations. Reply to Petition at 20. More specifically, the Services argue that the inclusion of the performance license within a larger, complex commercial agreement makes it more meaningful, because DCR did not purchase a license for the public performance of sound recordings. Rather, in exchange for a partnership agreement, DCR acknowledged that the right should exist for a particular rate. The Services neglect, however, to discuss why this observation is

important in their initial findings. Services RF ¶ 75-77. Later, the Services argue that the Panel's decision to use the DCR license fee as an appropriate benchmark rested on a weighing of the evidence and invoke the Panel's discretion to evaluate the testimony and fashion its decision accordingly. Reply to Petition at 20-21. The Services, however, fail to address RIAA's additional concerns about the negotiated license, except to note that the partner record companies never operated a joint advertising venture nor took advantage of the provisions which gave them some measure of control over

programming. Services RF ¶¶ 80–81. While the Register agrees with the Services that the Panel carefully considered the rationale for and the circumstances surrounding the negotiations setting the DCR license rate, she finds the Panel's adoption of this benchmark and its subsequent adjustments arbitrary. In the first instance, the benchmark offered by the Services cannot represent a license for a right to perform sound recordings, because no such legal right existed at the time of the negotiations. Woodbury 14 W.D.T. at 12; RIAA PF ] 84; Tr. 2102 (Vidich). DCR allowed that, in fact, it did not negotiate for a performance license in sound recordings; and instead, characterized the transaction as selling "to its record company partners the recognition they sought 'that the right existed for a particular rate.' "Services PF ¶ 102. To underscore this distinction, DCR insisted on a clause which stated that the United States law did not require DCR to pay a fee or royalty for the public performance of any sound recording, even though DCR agreed, as part of a complex commercial transaction, to pay its partner record companies what it calls a public performance license fee. Services PF ¶¶111, 136. An article in the press announcing the deal echoed this distinction. It noted that not only did the transaction allow DCR use of the record companies' repertoire, it also required DCR to support a performance right in sound recordings. DCR Ex. 27 (Paul Verna, Time Warner Breaks New Cable Ground; Enters Cable Radio Venture With Sony, Billboard, Feb. 6, 1996, at 1).

Consequently, the Register rejects the Panel's premise that the rate set for a nonexistent right would represent accurately the value of the performance right once it came into existence, especially where the parties

<sup>8</sup> Negotiated license fees and certain business information, which the Register has considered throughout her review, are not being published in the Register's review because the information is subject to a protective order. See Order Docket No. 96–5 CARP DSTRA (September 18, 1996).

<sup>&</sup>lt;sup>9</sup> Sony Music and Warner Music signed a partnership agreement with DCR in January 1993. A third record company. EMI, joined the partnership in April 1994, under substantially the same terms. Report § 164.

<sup>&</sup>lt;sup>10</sup> Associate Professor of Communications Studies at Northwestern University and Director of Northwestern's program in Telecommunications Studies, Management, and Policy.

<sup>&</sup>lt;sup>11</sup> Senior Vice-President of Strategic Planning and Business Development at Warner Music Group and a member of the Board of Directors of Digital Cable Radio Associates.

 $<sup>^{\</sup>rm 12}\,\rm President$  and Chief Executive Officer of Digital Cable Radio Associates.

<sup>&</sup>lt;sup>13</sup> Senior Vice-President and Chief Financial Officer of Digital Cable Radio Associates.

 $<sup>^{14}\,\</sup>mathrm{A}$  vice-president at the economic consulting firm of Charles River Associates, Inc.

acknowledge that the agreement encompassed more than the purported value of the coveted right, namely the recognition from the audio service that a performance right in sound recordings should exist. RIAA PF ¶¶94–95; Tr. 2209–12 (Wildman); Wildman W.R.T. at 9–12. Arguably, that recognition was more valuable consideration to the record companies than the license fee itself.

The conclusion that the DCR license fee may serve as the benchmark for setting the section 114 rates is undermined further by the very nature of the partnership agreement. All parties agree that the agreement concerning the performance right was merely one of eleven interdependent co-equal agreements which together constituted the partnership agreement between DCR and the record companies. Such strong ties between provisions in a negotiated document raise the question of how much give-and-take occurred in negotiating the final terms. Courts recognize that complex transactions encourage tradeoffs among the various provisions and lead to results that most likely differ from those that would result from a separately negotiated transaction.15 While DCR freely entered into the partnership agreement, the record contains no evidence that it would have freely entered into a separate performance license for sound recordings. To the contrary, the Service's own witness admits that it is unlikely that a stand-alone performance license would have been negotiated. Woodbury W.D.T. at 15. Accordingly, the Register concludes that it was arbitrary for the Panel to rely on a single provision extracted from a complex agreement where the evidence demonstrates that the provision would not exist but for the entire agreement. Under similar circumstances, the Southern District Court of New York found that "plucking one term out of the contract is likely to yield a fairly arbitrary result." American Society of Composers Authors and Publishers v. Showtime/The Movie Channel, Inc.

(ASCAP), published at 912 F.2d 572, 590 (S.D.N.Y. December 20, 1989) (No. 13–95 (WCC)) (rejecting proposal to rely upon provisions in guild agreement concerning payment of revenues where such provisions were part of a set of terms governing compensation, benefits, and working conditions). <sup>16</sup>

Another problem with adopting the DCR license fee is that it is not an industry-wide agreement, but rather the product of negotiations among only three record companies, which together account for approximately 35% of the sound recordings performed by DCR. RIAA PF ¶ 82; ŘÍAA RPF ¶ 39. The arbitrators understood the limited nature of the negotiations and made an adjustment to the license fee based on the mistaken assumption that the DCR license fee represented the value of the sound recordings owned by the three record companies party to the agreement, which purportedly represented 60% of the record industry. Report ¶¶ 166, 200. This assumption arose from a statement made by the Services in the summary statement contained in the Services' joint reply to RIAA's proposed findings. 17 The statement, however, has no support in the record. See Petition at 21 n.3; Reply to Petition at 21-22. Consequently, the Panel's upward adjustment of the base figure on the merits of this assertion was arbitrary.

This is not to say that the fact that the DCR license fee was negotiated with companies owning rights to only 35% of the relevant works renders that license fee irrelevant. It is, however, a further deficiency which in combination with the other deficiencies discussed herein, renders the Panel's reliance on the DCR license fee as its exclusive benchmark inappropriate.

Furthermore, the Panel's decision to rely on the DCR license fee deviates from CRT precedent where that agency refused to adopt, as an industry-wide rate, a set of rates negotiated by only certain of the affected parties as part of a general understanding involving issues in addition to the rate of compensation. Use of Certain

Copyrighted Works in Connection with Noncommercial Broadcasting, 43 FR 25068 (June 8, 1978). While no Panel need slavishly adhere to the past practices of the CRT, it must articulate a reasoned explanation for its deviation from past precedent. Distribution of 1990, 1991, and 1992 Cable Royalties, 61 FR 55653, 55659 (October 28, 1996). Otherwise, its actions may be construed as arbitrary or contrary to law. 18

The Register also finds that even if the 60% figure had record support, it would be arbitrary to adjust a negotiated license fee that purports to represent the market value of the digital performance right in sound recordings. Under the license agreement, DCR agreed to pay a percentage of its gross revenues for the right to perform sound recordings digitally, but only a portion of these fees were paid to each of DCR's three record company partners, allocated on the basis of the DCR playlist. 19 Tr. 2123-24 (Vidich); Services PF ¶ 111. Therefore, the license fee—to the extent that it was a license fee—already accounted for all copyright fees owed to the record industry, and it was inappropriate for the Panel to make any further adjustment. The Services seem to realize the Panel's error in this respect and note that the Panel was under no obligation to make an upward adjustment, since the license fee reflected the value of the sound recording and not the sum of the percentage amount each partner record company negotiated for use of its works. Reply to Petition at 22.

Furthermore, the Register finds that the Panel's conclusion that the DCR license fee "provides a useful precedent for setting a royalty rate in this proceeding" was arbitrary. Report ¶ 200. The only support for this finding was Woodbury's testimony that the trade article announcing the deal between DCR and its new record company partners, Sony and Warner, illustrated its precedential value, at least for the record companies. Woodbury W.D.T. at

<sup>15</sup> For example, in resolving a dispute between ASCAP and Showtime/The Movie Channel, Inc. over the fee for a "blanket" license, the Southern District Court of New York stated that:

it is fair to assume that in any negotiation that encompasses as many disparate issues as do the guild agreements, the negotiators will agree to tradeoffs, among the various negotiated items, ... The process of negotiation is thus likely to yield a complex pattern of results, most of which would have been different if the individual issue had been negotiated entirely separately from the others. Accordingly, plucking one term out of the contract is likely to yield a fairly arbitrary result.

is likely to yield a fairly arbitrary result. ASCAP v. Showtime/The Movie Channel, Inc., published at 912 F.2d 572, 590 (S.D.N.Y. Dec. 20, 1989) (Civ. No. 13-95 (WCC) (footnote omitted).

<sup>16</sup> This is not to say that in any case in which a CARP relied on a license fee that was part of a larger agreement containing a number of provisions unrelated to the license fee, such reliance would necessarily be arbitrary. But in light of the other deficiencies in the CARP's reliance on the DCR license, discussed herein, and especially in light of the fact that the license fee was for the exercise of a nonexistent right, the Register is compelled to conclude that in this case, the CARP's reliance on the DCR license fee as its exclusive benchmark was arbitrary.

<sup>17 &</sup>quot;DCR entered into a performance license with three record companies that represent approximately 60% of all recorded music sold in the United States." Services RF at 2.

<sup>&</sup>lt;sup>18</sup> Section 802(c), of the Copyright Act, directs the CARP to "act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c)."

<sup>&</sup>lt;sup>19</sup> For example, if the DCR license fee had been 5% of gross receipts (equaling \$100,000) and 40% of the sound recordings on DCR's playlist were owned by DCR's record company partners, then DCR would pay 40% of the license fees (\$40,000) on a prorata basis to these partners. The remaining 60% (\$60,000) represents the value of the digital performance of works owned by non-partnership record companies performed during the relevant time period—a sum that DCR would not actually pay under the terms of its license agreement.

The 5% license fee value does not represent the actual value of the negotiated fee because this information is subject to a protective order. See n.8

16. Mr. Woodbury's statements on the precedential value of the agreement, however, are full of qualifications, and he readily acknowledged that "a successful negotiation may have required that Warner and Sony compensate Music Choice for including the performance rights payments as part of the partnership agreement. The effect of this compensation may have restrained Warner and Sony in their choice of a higher fee level." *Id.* 

In addition, the partnership agreement itself fails to support the Panel's finding. It includes material redacted subject to the protective order, DCR Exs. 7, 8 & 15 at ¶ 6, and a provision that the rate will be superseded if Congress establishes a performance right in sound recordings DCR Exs. 7, 8, & 15 at ¶ 9. Vidich W.R.T. at 7; Tr. 2106-2107 (Vidich); Del Beccaro W.D.T. at 9. Because the partnership agreement included language that undermined any precedential value of the digital performance license included therein. the Register finds that the Panel's reliance on the DCR license fee as precedent was an arbitrary action. See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Insurance Co., 463 U.S. 29 (1983) (agency action is arbitrary where the agency offers an explanation for its decision that runs counter to the record evidence).

In setting a range of possible rates for the section 114 license, the Panel made further adjustments to the base figure to account for the payments to the recording artists. Under the DPRSRA. recording artists are entitled to half of the royalties collected under the compulsory license. 17 U.S.C. 114(g). RIAA argues that the DCR license fee must be adjusted to account for this provision in the law that entitles recording artists to a share of the royalties, because the record companies were under no obligation to share the royalties. RIAA RPF ¶ 40; Petition at 28. RIAA also argued for additional upward adjustments of the benchmark to compensate the record companies for certain differences between the DCR license and the compulsory license. including compensation for loss of royalties generated from foreign and commercial subscribers, and loss of revenue due to a shift in how the Services offer their product to subscribers.

RIAA anchors its arguments for these requested adjustments on the presumption that the responsibility of the Panel was "to determine the royalty [rate] that would be produced through free market negotiations, absent the compulsory license." RIAA RPF ¶41.

This presumption, however. misrepresents the Panel's duty, which is to establish reasonable rates and terms. See discussion supra concerning the use of a marketplace standard in setting the royalty rate. While RIAA may have a reasonable expectation that a Panel would make appropriate adjustments to a marketplace benchmark that the Panel adopts for further consideration in light of the statutory objectives, and that is not to say that the requested adjustments are appropriate, there is no justification for making the adjustments where the benchmark value does not fulfill that function. Therefore, having found that the DCR license fee does not represent the marketplace value of sound recordings, the Register need not consider further arguments on adjusting

For the reasons cited above, the Register finds that the Panel was arbitrary in relying on the DCR license fee for the purpose of establishing an accurate evaluation of the marketplace value for the performance right.

The Panel's Determination of a Specific Range of Fees for the Public Performance of the Musical Compositions Was Arbitrary

The Services pay separate license fees to Broadcast Music, Inc. (BMI), the American Society of Composers. Authors, and Publishers (ASCAP), and SESAC, Inc. for the public performance of the underlying musical works in the sound recordings. The Services introduced evidence on what they pay the performing rights organizations for the public performance of the musical works to illustrate the industry practice that "licensing rates ordinarily paid in the recording and music industries for the use of copyrighted works are far less than 41.5%, and generally are within the low single digit range for use of copyrighted music and sound recordings." Rosenthal <sup>20</sup> W.R.T. at 3; Tr. 1646, 1669–70, 1674 (Massarsky).<sup>21</sup>

Using the license fees DMX and DCR<sup>22</sup> pay for the right to perform

<sup>20</sup> An attorney with the law firm of Berliner, Corcoran & Rowe, L.L.P., in Washington, D.C., who represents recording artists, writers, production companies, record companies, and multimedia companies.

<sup>21</sup> An economic consultant with the firm of Barry M. Massarsky Consulting, Inc.

musical compositions in the BMI and SESAC repertories and the anticipated payments that ASCAP will receive upon resolution of a rate dispute between itself and the Services, and not the interim rates that the Services currently pay ASCAP, which are usually lower than the final determination of the rate court, the Panel set an upper limit on the value of the performance right for the musical compositions. Report ¶¶ 167(B)-(G). In making this determination, the Panel accepted Massarsky's testimony that ASCAP license fees are "generally greater than, but at least no less than, BMI license fees," and made its calculations accordingly. Report ¶ 167(E); see also RIAA PF ¶¶ 106–108.23 In addition to setting an upper limit on the amount the Services would pay for these performance licenses, the Panel announced a lower limit for this benchmark but provided no discussion on how it arrived at this figure.

RIAA accepts the Panel's determination for an upper limit valuation for the performance right in musical works, but challenges the Panel's determination of the lower limit of this value. Petition at 16–20. RIAA contends that because the Panel had actual figures upon which to base its calculation, it was arbitrary to set a lower limit. *Id.* at 17.

From an examination of the record, the Register cannot determine how the Panel derived the lower limit figure, but she has identified at least one way that the Panel could have settled upon the lower figure. It entails the use of the interim rates which the Services pay ASCAP currently, instead of relying on a figure equal to or greater than the rate paid to BMI. Tr. 1669 (Massarsky), Tr. 1028–1029 (McCarthy). Use of such an approach, however, is expressly

<sup>&</sup>lt;sup>22</sup>The Services pay an interim rate set in 1989 to ASCAP for the performance of the musical works in its repertoire. Tr. 1029 (McCarthy); Tr. 1656 (Massarsky). DCR also pays an interim rate to BMI. These rate disputes are currently the subject of adjudication before the "rate court" in the Southern District of New York. Services RF ¶ 52–53; 100–105. Pending the outcome of the rate cases, DCR has agreed to pay BMI the same contractual rate that DMX pays for the musical works performance license. Tr. 1653 (Massarsky).

<sup>&</sup>lt;sup>23</sup> CRT and judicial precedent supports the Panel's premise that ASCAP usually receives slightly higher royalty fees for the public performance of its works than does BMI. In American Society of Composers, Authors, and Publishers v. Showtime/The Movie Channel, 912 F.2d 563 (2nd Cir. 1990), the court affirmed the rate court decision that a "blanket" license rate for use of ASCAP works should be set slightly higher than the rate the cable network pays for a BMI license This result reflected the agreed upon 55-45 ratio that ASCAP and BMI adopted in dividing their share of the royalties for compulsory licenses paid by cable system operators for retransmissions of broadcast signals. See also 1978 Cable Royalty Distribution Determination, 45 FR 63026 (Sept. 23, 1980) (CRT determined that of the 4.5% royalty share awarded to the music claimants' group in the 1978 cable distribution proceeding, ASCAP would receive 54%, BMI, 43%, and SESAC, 3% of the royalties.); 1987 Cable Royalty Distribution Proceeding, 55 FR 11988 (March 30, 1990) (CRT again adjusted the distribution percentages for cable royalties so that ASCAP received a 58% share of the disputed royalties and BMI received the remaining



disavowed by two of the Services' own expert witnesses who agree that it is inappropriate to rely on interim rates to determine competitive market rates. Woodbury W.R.T. at 19 n.70; Tr. 2710–2711 (Woodbury); Tr. 1029 (McCarthy). The Register concurs with these witnesses's assertions, and therefore rejects any figure which uses an interim rate in calculating a value when specific evidence exists in the record discounting this methodology and nothing supports its use.

Nor could the Panel consider just the individual license fees which the Services pay to a single performing rights organization in setting the lower limit, having rejected a similar argument when the Services initially proposed making this comparison. Report ¶ 168. A single license fee covers only those musical works under the control of the individual performing rights organization granting the license. Therefore, a Service must obtain a "blanket" license from every performing rights organization in order to have the freedom to play virtually any musical composition without infringing its copyright. Hence, the total value attached to the performance of the underlying musical works would be the sum of the license fees paid to each of the performing rights organizations, just as the value of the digital performance right in sound recordings would be the fees paid to all record companies. See Report ¶ 168.

The Register perceives no rational connection between the Panel's factual conclusions and its decision to set a lower limit for this benchmark. Where the record provides clear evidence of what the Services actually pay for the performance licenses, and the witnesses agree that the interim rates which are currently being paid represent de minimis value for these licenses, the Panel need not look beyond this information to determine the value of the benchmark. For the reasons discussed above, the Register does not consider the Panel's lower limit on the performance license fees for musical compositions when proposing a royalty rate for the section 114 license.

Use of Benchmarks Approximating Marketplace Value in Setting the Section 114 Rate

A benchmark is a marketplace point of reference, and as such, it need not be perfect in order to be considered in a rate setting proceeding. In the 1980 rate adjustment proceeding for coin-operated phonorecord players, the Tribunal considered different marketplace models and found that each analogy had distinguishing characteristics, but

nevertheless considered them in conjunction with the record evidence and the statutory objectives. 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884, 888 (1981) ("While acknowledging that our rate cannot be directly linked to marketplace parallels, we find that they serve as an appropriate benchmark to be weighed together with the entire record and the statutory criteria"). The U.S. Court of Appeals for the Seventh Circuit approved the Tribunal's approach, stating that:

We think that the Tribunal could properly take cognizance of the marketplace analogies while appraising them to reflect the differences in both the respective markets (e.g., with respect to volume and industry structure) and the regulatory environment. It is quite appropriate and normal in this administrative rate determination process to find distinguishing features among various analogous situations affecting the weight and appropriate thrust of evidence rather than its admissibility. No authority cited by AMOA would require the Tribunal to reject the ASCAP/SESAC analogies. Comparable rate analogies have been repeatedly endorsed as appropriate ratemaking devices.

AMOA v. CRT, 676 F.2d at 1157. See also San Antonio v. United States, 631 F.2d 831, 836–37 (D.C. Cir. 1980), clarified, 655 F.2d 1341 (D.C. Cir. 1981); Burlington Northern, Inc. v. United States, 555 F.2d 637, 641–43 (8th Cir. 1977).

When setting the rates for the statutory performance license in sound recordings, the benchmarks are merely the starting point for establishing an appropriate rate. The deciding body uses the appropriate marketplace analogies,<sup>24</sup> in conjunction with record evidence, and with regard for the statutory criteria, to set a reasonable rate.

In this proceeding, the Register finds that both the negotiated DCR license fee and the marketplace license fee for the performance of the musical works are useful at least in circumscribing the possible range of values under consideration for the statutory performance license in sound recordings. While the DCR license fee purports to represent a negotiated value for a right to which, by law, the record

companies were not entitled (in addition to the recognition that the right should exist), the Register acknowledges that the value of the DCR license provides minimal information as to the value of the performance right ultimately granted in the DPRSRA although it does provide some guidance for assessing the proposed rate. See Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates (115 Rate Adjustment Proceeding), 46 FR 10466, 10483 (Feb. 3, 1981) ("We find that the foreign experience is relevant—because it provides one measure of whether copyright owners in the United States are being afforded a fair return").

On the other hand, the second reference point—the negotiated license fees for the performance of music embodied in the sound recordingsoffers specific information on what the Services actually pay for the alreadyestablished performance right of one component of the sound recording. The Panel recognized this reference point's usefulness and used it to further support its choice of a royalty rate. Report ¶ 201. The question, however, is whether this reference point is determinative of the marketplace value of the performance right in sound recordings; and, as the Panel determined, the answer is no. Report ¶¶ 169, 201.

Initially, neither the Services nor RIAA placed much weight on this marketplace reference point, although RIAA has consistently argued that the value of the performance right in sound recordings is greater than the value of the performance right in the underlying musical works. RIAA RPF ¶ 16, Petition at 10-16. On the one hand, the Services argue that the musical composition is the key to a successful recording. Services RF ¶ 10-12, citing Tr. 1664 (Massarsky), and on the other hand, RIAA contends that a song lacks feeling until the recording artist breathes life into the song. Morris 25 W.D.T. at 1-2; Petition at 12-13. Because neither side presented conclusive evidence on this point, the Panel observed only that both groups are "parents of the music." Report ¶ 169.

ŘIAA faults the Panel for its lack of discussion on the question of whose rights in the phonorecord are more valuable. Petition at 10–16. While the Register agrees that the Panel did not make specific citations to record evidence, its finding that "[t]here was insufficient and conflicting evidence to make a determination that the

<sup>&</sup>lt;sup>24</sup> A Panel is free to reject a proposed benchmark that does not reflect accurately the characteristics and dynamics of the industries subject to the proposed rate. See e.g., Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting, 43 FR 25068–69 (1978) (CRT found voluntary license between BMI, Inc. and the public broadcasters, Public Broadcasting System and National Public Radio, of no assistance in setting rate for use of ASCAP repertoire); Adjustment of the Royalty Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry, 47 FR 52146 (November 12, 1982).

<sup>&</sup>lt;sup>25</sup> A country music artist who has recorded 14 albums, including five number one songs.

performers and record companies deserve a larger percentage from the Services than granted to the music works," was supported by the record evidence. Report ¶ 169.

To make its point, RIAA presented an analysis of revenues from record sales in support of its argument that the marketplace values the contributions of the record companies and the performing artists more than it values the contributions of the copyright owners in the musical compositions. RIAA's PF ¶¶ 112–120; Petition at 10– 16. This evidence showed that copyright owners of the musical composition receive between 5-20% of the wholesale price for the sound recordings based on sales of CDs and cassette tapesapproximately 5% from the average wholesale price for an average CD and 12% from an average cassette.26 RIAA PF ¶¶ 115, 119. Recording artists, on the other hand, receive 7-10% of the average wholesale price for a typical CD and 15-20% for a typical cassette, leaving approximately between 56-88% of the revenues from sales for the record companies. RIAA ¶ PF 116.

The Services disagreed with RIAA's interpretation of the marketplace data, contending that the reason the "(r)ecord companies receive a bigger percentage of revenues from the sale of sound recordings (is) because they have a bigger monetary investment in the record production costs, as well as the leverage to minimize the royalties paid to songwriters, music publishers, and recording artists." Services RF ¶¶ 118-120. They also oppose RIAA's implication that the record companies should receive more value from the performance right in sound recordings than the songwriters receive for a similar right because the record companies garner more revenue from the use of the mechanical license than do the songwriters and composers.

The Services accurately note that the mechanical license and the digital performance license represent different and distinct rights to the copyright holders under the law, and they make no attempt to tie the value of the rights associated with the mechanical license to the value of the digital performance right, a right newly recognized with the passage of the DPRSRA. Even RIAA, the proponent of the assertion, fails to explain why the relative value of the mechanical license to the various owners and users has any application to the determination of the value of a digital performance license in sound

recordings. Consequently, where no clear nexus exists between the values of different rights, the model serves no practical purpose in computing the value of the digital performance right.

Hence, RIAA's contention that the data supports its assertion that the marketplace places a higher value on the contributions of the record companies and the recording artists in the creation of the phonorecord fails, because it does not discuss the constraining effect the mechanical license has on the copyright owners in setting a value on their reproduction and distribution right. Record companies pay the copyright owners of the musical compositions no more than the statutory rate for the right to reproduce and distribute the musical composition in a phonorecord. The record company then, in turn, sells the phonorecord at a fair market price. Because both groups do not share equal power to set rates in an unfettered marketplace, it is unreasonable to compare the value of the reproduction and distribution right of musical compositions-a rate set by the government at a level to achieve certain statutory goals-with the revenues flowing to record companies from a price set in the marketplace according to the laws of supply and demand, and then to declare that the marketplace values the sound recording more than the underlying musical composition. Consequently, RIAA's evidence sheds no light on the relative value of the sound recording performance right and the musical works performance right.27

In addition to the foregoing discussion, the Register notes that Congress did not intend for the license fees paid under the new digital performance license to "diminish in any respect the royalties payable to copyright owners of musical works for the public performance of their works." S. Rep. No. 104-128, at 33 (1995) (emphasis added). See also 17 U.S.C. 114(i). Although this statement does not express Congress' intent that the license be set below the value of the public performance right in the musical works, it indicates that Congress considered the possibility that such would be the outcome, and sought through express legislation to protect the current value

of the performance right in musical works.

Based on a review of the record evidence, the Register concurs with the Panel's conclusion that there was insufficient evidence to determine that the performers and record companies deserve a larger percentage from the Services than that received by the copyright holders in the musical works. That being so, the Register finds no basis for making an upward adjustment to the musical works performance license fees to establish a broader range of potential rates.

#### c. Statutory Objectives

Section 801(b)(1) of the Copyright Act states that the rates for the section 114 license shall be calculated to achieve certain statutory objectives. The Panel evaluated each statutory objective and made a finding as to whether the Services or RIAA furthered that objective. If the Services contributed more to furthering the objective, the Panel gave more consideration to setting a rate at the lower end of the possible range, and conversely, if the record companies made the more significant contribution, the Panel found this to favor a rate toward the upper end. Report ¶ 19((A)-(D).

The Panel's analysis led it to set a rate toward the low end of its range, because a rate set toward the high end would thwart the statutory objectives under current market conditions. *Id.* The Panel expressly noted that a future Panel may reach an entirely different result based on the then-current economic state of the industry and new information on the Services' impact on the marketplace. Report ¶ 202.

RIAA contends that the Panel's findings that all factors favor setting a low rate is contrary to CRT precedent. Petition at 32. This contention relies on a statement from the D.C. Court of Appeals, which upon reviewing the CRT's 1980 Mechanical Rate Adjustment Proceeding concluded that the factors "pull in opposing directions." *Id.*, citing *RIAA* v. *CRT*, 662 F.2d at 9. But in making this statement, the court merely made an observation that the statutory objectives required the Tribunal to weigh opposing factors in determining how best to achieve each objective. It went on to say that the Tribunal had the responsibility of reconciling these factors in setting a reasonable rate, but the court did not preclude the possibility that the Tribunal might find that the application of the factors to the evidence consistently supported either a high rate or a low rate. RIAA v. CRT, 662 F.2d at

<sup>&</sup>lt;sup>26</sup> Interested parties are free to negotiate a rate below the statutory rate for the mechanical license and often do. Tr. 1660 (Massarsky).

<sup>27</sup> Even if there was some value to the comparison, RIAA does not appear to factor into its calculations the value of the sound recordings in those phonorecords that do not show a profit. According to the record, "approximately 85 percent of all sound recordings do not recoup the costs that are spent to make and to market those recordings. Indeed, over two-thirds of all sound recordings sell less than 1,000 copies." Report ¶ 105.

The Register approves the Panel's basic approach in utilizing the factors to determine its rate for the digital performance right and adopts the Panel's findings where the evidence supports its conclusions.

The Panel's determination that the statutory objectives supported setting a rate favoring the Services was not arbitrary

The Panel's ultimate conclusion that the best way to achieve the four statutory objectives was to set a low rate favoring the Services is supported by the evidence presented in this proceeding. How much weight to accord each objective is within the discretion of the Panel, which may accord more weight to one objective over the others so long as all objectives are served adequately. See RIAA v. CRT, 662 F.2d at 9. In RIAA v. CRT, the court reviewed the Tribunal's decision to raise the rate for making and distributing phonorecords from two cents to four cents. It found the copyright users' argument that the Tribunal failed to give adequate consideration to certain factors over others unavailing. In discussing the impact of the statutory objectives on the ratemaking process, the court stated:

(T)he Tribunal was not told which factors should receive higher priorities. To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, the Tribunal is free to choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a "zone of reasonableness."

Id. at 9 (citations omitted). Hence, the Panel was free to find that a rate on the low end was reasonable so long as that rate fell within the "zone," and the "zone" was calculated to achieve the statutory objectives.

The Panel's analysis and application of the statutory objectives, however, are not without problems. The Register finds that on occasion, the Panel either did not perceive or misinterpreted the precedential underpinnings of the statutory objective.

A full discussion of the Panel's deliberations and the parties' responses concerning the evaluation and application of the four statutory objectives follows.

A. Maximize the Availability of Works. (17 U.S.C.801(b)(1)(A)).

The Panel found that the digital audio services "substantially increase the availability of recordings by providing many channels of uninterrupted music of different genres," noting the diversity of the music offered by the Services. Report ¶¶ 121–122. Based on this

finding, the Panel concluded at the end of its report that "[t]o maximize the availability of creative works to the public \* \* the rate should be set on the low side. A lower rate will hopefully ensure the Services' continued existence and encourage competition so that the greatest number of recordings will be exposed to the consumers." Id. ¶ 198(A).

RIAA alleges that the Panel misinterpreted this statutory objective because it focused on "whether the Services promote the sale of sound recordings," rather than "whether the proposed rate will maximize the availability of sound recordings." RIAA RPF ¶ 43; Petition at 37–41. In support of its position, RIAA recalls the 1980 jukebox rate adjustment proceeding. where the CRT concluded, in its discussion of section 801(b)(1)(A), that jukeboxes were not crucial to assuring the public of the availability of creative works. 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884, 889 (1981). The Tribunal, however, did find that "reasonable payment for jukebox performances will add incrementally to the encouragement of creation by songwriters and exploitation by music publishers, and so maximize availability of musical works to the public." *Id.* On the strength of past CRT precedent and the courts' recurring observation that compensation to the author or artist stimulates the creative force, 28 RIAA disputes the Panel's conclusion, contending that the best way to maximize the availability to the public is to ensure that copyright owners receive fair compensation for their works. Petition at 38.

The Services support the Panel's findings and conclusion but offer no legal support for their position except to note that "[t]he Courts have long held that under copyright law, reward to copyright owners is a 'secondary consideration' that ultimately serves the cause of promoting public availability of copyrighted works." Reply to Petition at

27 (citations omitted). The Services assert rightfully that the primary rationale for the copyright law is to stimulate the creation of artistic works for the benefit of the public. Twentieth Century Music v. Aiken, 422 U.S. 151. 156 (1975), citing Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring this monopoly \* \* \* lie in the general benefits derived by the public from the labors of authors"). But in underscoring the primary purpose for the copyright law, the Court in Aiken acknowledges that this aim is achieved by allowing the copyright owners to receive a fair return for their labor, the position advanced by RIAA. Id. ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good"). See also Sonv Corp. America v. Universal City Studios. Inc., 464 U.S. 417 (1984); United States v. Paramount Pictures, 334 U.S. 131 (1948). The positive interplay between compensation and creation is a basic tenet of copyright law, and as such, its contribution to stimulating the creation of additional works cannot be set aside lightly.

In such matters where the Panel failed to discuss any relevant case law or past precedent construing the statutory objective before rendering its determination, the Register finds the Panel acted in an arbitrary manner. The finding is based on the Panel's failure to consider CRT precedent and to provide a rational basis for its departure from prior proceedings construing the same statutory objective. See Pontchartrain Broad. v. FČC, 15 F.3d 183, 185 (D.C. Cir. 1994) ("an unexplained departure from Commission precedent would have to be overturned as arbitrary and capricious"). Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Insurance Co., 463 U.S. 29 (1983); Celcom Communications Corp. v. FCC, 789 F.2d 67 (D.C. Cir. 1986); Airmark Corp. v. FAA, 758 F.2d 685 (D.C. Cir. 1985).

There is no record evidence to support a conclusion that the existence of the digital transmission services stimulates the creative process. Instead, the Panel made observations concerning the development of another method for disseminating creative works to the public—a valid and vital consideration addressed in the statutory objective concerning relative contributions from each party—but fails to discuss how the creation of a new mode of distribution will itself stimulate the creation of additional works.

<sup>28</sup> Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984), quoting United States v. Paramount Pictures, 334 U.S. 131, 158 (1948), ("'IR]eward to the author or artist serves to induce release to the public of the products of his creative genius."); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (compensating authors "serve[s] the cause of promoting broad public availability of literature, music, and the other arts"); 115 Rate Adjustment Proceeding, 46 FR 10479 (1981) (In discussing section 801(b)(1)(A), the CRT looked to the purpose of the section 115 license which was "intended to encourage the creation and dissemination of musical compositions." Therefore, the Tribunal set the rate to "afford songwriters a financial and not merely a psychic reward for their creative efforts" as a way to maximize the availability of creative works).

Because the Panel failed to reconcile its determination with past CRT precedent and case law, the Register rejects both the Panel's findings and conclusions on this point as arbitrary. Instead, the Register concludes that the record companies and the performers make the greater contribution in maximizing the availability of the creative works to the public, a conclusion consistent with past CRT precedent.

B. Relative Roles of the Copyright Owners and the Copyright Users in Making Product Available to the Public.

(17 U.Š.C. 801(b)(1)(C)).

The statutory objective addressing the relative roles of the parties contains five different factors, which the Panel evaluated independently. In analyzing the first component of this objective, the relative creative contribution, the Panel found that both the recording companies and the performers make substantial creative contributions to the release of a sound recording. Report ¶ 87. Its determination credited the performers and the record companies for their work in making the musical work come alive. Id. ¶¶81-83. The Services were found to make no such significant contribution to the creation of the sound recording. Instead, their contribution was seen as more limited, since it merely enhanced the presentation of the final work through unique programming concepts. Id. ¶¶84–86. On balance, the Panel found "that the artists and the record companies provide greater creative contributions to the release of sound recordings to the public than do the Services," id. ¶87, a finding supported by CRT precedent. 29

The Panel continued its consideration of the relative contribution of the owners vis-a-vis the users in making the product available to the public and determined that the Services made the greater contribution with respect to the four remaining factors: technological contributions, capital investment, costs and risks to industry, and the opening of new markets. Report ¶¶ 88, 93, 94,

97, 98, and 109.

In making this determination, the Panel focused on the technological developments made by the Services in opening a new avenue for transmitting sound recordings to a larger and more diverse audience, including the creation of technology to uplink the signals to

satellites and transmit them via cable; technology to identify the name of the sound recording and the artist during the performance; and technology for programming, encryption, and transmission of the sound recording. *Id.* ¶¶89–92. In contrast, the Panel found that the record companies made no contributions in these areas. *Id.* ¶93.

The Panel also weighed the evidence presented in support of the parties' relative roles in making capital investments in equipment and technology, the third factor. The Panel determined that the Services made a substantial showing of their \$10 million investment in equipment and technology, Report ¶ 95 and cites therein, whereas RIAA did not suggest that any capital investment was required on its part. *Id.* ¶ 97.

And finally, the Panel found that the fourth factor, the relative costs and risks incurred by the parties in making the product available to the public, was greater for the Services than for the record companies and the performing artists, even though the record companies do incur substantial costs and risks in producing the product used by the Services. Id. ¶¶98-108. In making its determination, the Panel balanced the costs and risks involved in producing the sound recordings against the cost and risks associated with bringing the creative product to market in a new and novel way. Id. ¶¶ 99-107. In support of its findings, the Panel noted that the Services have invested significant start-up costs and are currently undergoing a shift in how they market their services. Id. ¶¶55, 73-78, 99, and 102. In addition, the Services contend, and the Panel agrees, that the Services face new competition from the internet and digital radio. Consequently, it is far from clear whether the Services can survive. Id. ¶¶ 72, 99.

The Panel also found that record companies face tremendous risks when producing new sound recordings, citing the record companies' submissions showing that record companies fail to recover the production costs for approximately 85% of sound recordings, much less show a profit. Id. ¶ 105. The Panel, however, went on to find that the record companies have adapted to the vagaries of the music business, and as an industry, have shown consistent growth in units shipped and dollar value of records, CDs, and music videos from 1982-1996. Id. ¶ 108.

The Panel's key finding from its analysis of the third objective was that the Services contribute more to the opening of new markets for creative

expression through the development of

the digital audio services. Id. ¶ 109. The Panel credited the Services with opening new markets for creative expression because they expose the public to a broader range of music than does traditional over-the-air radio. Unlike traditional radio, the Services offer multiple channels for classical, jazz, traditional, alternative, and ethnic formats. Id. ¶ 110. Because subscribers frequently purchase new music heard for the first time on the service, the Panel found that record companies arguably benefit directly from the expanded musical formats offered by the Services. Id.  $\P$  112. The Panel also found that the Services' future plans to offer subscribers an opportunity to purchase the sound recordings directly will "undoubtedly" open new markets for the record companies. *Id.* ¶¶114–

The record companies do not accept the Panel's findings concerning this statutory objective, and once again, take issue with the Panel's interpretation, positing that the Panel impermissively focused on "whether recording companies had made a particular contribution to the Services operations-and wholly ignored the contributions that the recording industry had made to the sound recordings themselves." Petition at 45-46. RIAA's predicate for its argument is its interpretation that the statutory phrase, "in the product made available to the public," 17 U.S.C. 801(b)(1)(C), refers only to the creation of the sound recordings and not to the Services' creation of a new means for bringing the sound recordings to the listener. Petition at 46

In addition to this alleged fundamental flaw in interpretation, RIAA contends that the Panel "improperly collapsed (its cost/risk analysis) into a risk only (analysis)" and ignored empirical evidence in the record discounting the promotional value of the Services' offerings. Id. at 47-48. RIAA, however, fails to note that the Panel did acknowledge that the record companies incur significant costs and risks in their business. Report ¶¶ 105–107. But the Panel also found that the Services presented no additional risk to the record companies unless the customers of the Services record the sound transmissions in lieu of purchasing these products at a retail store." Report ¶ 107 (emphasis added). Because the record companies introduced no evidence showing decreased overall sales of records and CDs, the Panel reasonably found that the record companies did not incur additional risk from lost sales due to the Services' activities. Report ¶¶ 107, 111.

<sup>&</sup>lt;sup>29</sup>The CRT refused to award broadcasters a share of the cable royalties for their role in formatting radio stations. The Tribunal construed the claim as one for compilation which had a de minimis value. The U.S. Court of Appeals for the D.C. Circuit upheld the Tribunal's determination. NAB v. CRT, 772 F.2d at 931.

If anything, the Panel believed that the Services decreased the risk to the recording companies because the digital audio services have substantial promotional value. The promotional value comes from the constant airplay of new types of music not readily accessible in the marketplace, which in turn stimulates record sales. Report ¶ 110. In making this finding, the Panel relied on Simon's and Rubinstein's testimony that "subscribers frequently purchase new music precisely because they heard it on one of the Services,' Report ¶ 112 citing Simon 30 W.D.T. at 1; Rubinstein W.D.T. at 34; Tr. 1442 (Rubinstein), and on the record industries' practice of supplying complimentary copies of their products to the Services for use on the air to promote the sales of an album. Tr. 1291 (Rubinstein); Tr. 1182-83, 1201 (Talley) 31; DMX Ex. 3. See also Tr. 2248 (Wildman) ("Is there a benefit to the record company from getting music exposed that might become a hit that wouldn't get exposed otherwise? Of course there is")

Furthermore, RIAA's reliance on the preliminary DCR survey for the proposition that the Services do not promote sound recording sales is untenable where the record clearly shows that the record companies provide promotional copies to the Services. In fact, RIAA's own expert acknowledges "there (are) promotional benefits to recording companies from having their music played on radio stations or the digital music services." Tr. 2220 (Wildman).

In contrast to RIAA's fundamental objection to the Panel's interpretation of this statutory objective, the Services contend that the Panel made a reasonable determination that the phrase, "the product made available to the public," applied to both the sound recordings and the entire digital music service. Reply to Petition at 29. This finding is consistent with the 1980 rate adjustment proceeding for the mechanical license, where the CRT credited the record companies, the users of the musical compositions for purposes of the mechanical license, with developing new markets through technological innovations, and through the creation of record clubs, mail order sales, and television advertising campaigns. 46 FR 10480-81 (1981).

In making her determination on this point, the Register reflects on the

statutory responsibilities of the Panel which is to set reasonable rates and terms for the public performance of sound recordings by certain digital audio services. (emphasis added). "In deciding to grant a new exclusive right to perform copyrighted sound recordings publicly by means of digital audio transmission, the Committee was mindful of the need to strike a balance among all of the interests affected thereby." S. Rep. No. 104-128, at 15-16 (1995). By its very nature, the section 114 license contemplates weighing the contributions of the users in creating and expanding the market for the performance of the sound recording in a digital technological environment. Without dispute, the evidence reveals a large investment of capital by the Services to create a new industry that expands the offerings of the types of music beyond that which one receives over the radio, through live performances, and other traditional means of public performance. Report ¶¶ 44, 49, 52, 99, 102–104, 110, 113; Simon W.D.T. at 3-4; Rubinstein W.D.T. at 13-14; Tr. 853-54 (Del Beccaro); Tr. 1237-40 (Rubinstein); Tr. 1476-78 (Funkhouser); DMX Ex. 32. Conversely, the record companies offered little or no evidence on their contributions relating to the key factors. Report ¶¶ 93, 97, 111.

From the foregoing analysis, the Panel concluded that the record companies contributed more in only one of the five areas under consideration in evaluating this statutory objective, and consequently, the rate should be set at a minimum level in favor of the Services. Report ¶ 198(C).

C. To Minimize Any Disruptive Impact on the Structure of the Industries Involved. (17 U.S.C. 801(b)(1)(D)).

The Panel determined that a rate set too high could cause one or all of the Services to abandon the business. Report ¶¶ 117-118; Troxel<sup>32</sup> W.R.T. 1, 5-6; Tr. 2553-2554; DMX Ex. 49(b). The Panel considered the nature of the Services' business, noting its need to increase its subscriber base just to reach a break-even point without the added obligation of paying an additional fee for a digital performance right. Id. ¶¶ 119(a)–(d). The Panel also calculated that the record companies would receive substantially less than a 1% increase in their gross revenues even if the rate were set at the highest proposed level (41.5% of gross revenues), underscoring the lesser impact of the license fees on the record industry. Id. ¶ 119.

RIAA implies that a low statutory rate for the digital performance right will have a negative impact on their future negotiations with other digital services. RIAA RPF ¶¶ 58, 105; Petition at 43. They also object to the Panel's constant reference to revenues generated from the distribution and reproduction rights and its alleged lack of consideration of CRT precedent. Petition at 43–44.

In support of the Panel's evaluation, the Services note that RIAA failed to introduce any evidence concerning the impact a low rate would have on the record companies and performing artists, in direct contrast to the abundance of financial information submitted by the Services in support of their assertion that a high rate could devastate the industry. Reply to Petition at 28.

While RIAA correctly states that the Panel considered the record companies' revenues generated from the exercise of other rights granted to them under the Copyright Act, the Panel's purpose was merely to demonstrate the financial health of the industries. The Panel never implied that the record companies should receive anything less than reasonable compensation under the DPRSRA, nor that their revenues from the exercise of the distribution and reproduction rights are meant to compensate them for the use of their creative works under the new statutory license. Rather, it determined that a reasonable rate for the digital performance right should be set at a level to allow the three companies currently doing business to continue to do so. This balance in favor of the Services supports both the statutory objective to consider the impact on the industries and Congressional intent not to hamper the arrival of new technologies. S. Rep. No. 104-128, at 15-16 (1995). The law requires the Panel, and ultimately the Librarian, to set a reasonable rate that minimizes the disruptive impact on the industry. It does not require that the rate insure the survival of every company. See 115 Rate Adjustment Proceeding, 46 FR 10486 (1981) ("We conclude that while the Tribunal must seek to minimize disruptive impacts, in trying to set a rate that provides a fair return it is not required to avoid all impacts whatsoever").

The Register acknowledges RIAA's uneasiness with the possibility that the rate which is ultimately adopted may have precedential value for their negotiations with other digital services, but such concern is misplaced. The rate under consideration applies only to the non-interactive digital audio subscription services, provided, of

 $<sup>^{\</sup>rm 32}$  Chief Executive Officer and President of Digital Music Express since July 1997.

<sup>&</sup>lt;sup>30</sup> Senior Vice-President of Programming at Digital Cable Radio Associates.

<sup>&</sup>lt;sup>31</sup> Executive Vice-President and Chief Technical Officer of Digital Music Express who oversees research and development, and technical operations verdevide.

course, that they are eligible under the law and comply with all legal requirements. See 17 U.S.C. 114(d)(2). Congress, fully recognizing the threat that interactive services pose to the record companies, crafted the law so that they were ineligible for the compulsory license. The result of this decision is that record companies have an opportunity to negotiate an appropriate marketplace rate for a digital performance license with these

Interactive services, which allow listeners to receive sound recordings "on-demand," pose the greatest threat to traditional record sales, as to which sound recording copyright owners (of sound recordings) must have the right to negotiate the terms of licenses granted to interactive services.

S. Rep. No. 104-128, at 24 (1995). Congress also included provisions in the DPRSRA to establish different rates for different types of digital audio subscription services. Section 114(f)(1) states that "(s)uch terms and rates shall distinguish among the different types of digital audio transmissions then in operation." This language gives the Panel and the parties broad discretion in setting rates for different types of digital audio services, when such distinction is warranted. Nor must the record companies accept the final rate from this determination for a new type of digital audio service which emerges before the next regularly scheduled rate adjustment proceeding. The law expressly allows for another rate-setting proceeding upon the filing of a petition. 17 U.S.C. 114(f)(4)(A)(i). Together, these provisions provide an opportunity to the record companies to make their case for a higher rate, where circumstances support such a determination.

In addition, as the market conditions change and the industry shows significant growth and profitability. another Panel will have an opportunity to make adjustments to the rate, and may well find that the changed circumstances favor an upward adjustment. In any event, the Register must make her recommendation based on the evidence in the current record before the Panel, which supports the Panel's determination that the best way to minimize the disruptive impact on the structure of the industries is to adopt a rate from the low range of possibilities. Report ¶ 198(D).

D. To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions. (17 U.S.C.

801(b)(1)(В)).

Usually this balance is struck in the marketplace through arms-length negotiations; and even in the case of a

statutory license, Congress encourages interested parties to negotiate among themselves and set a reasonable rate which inevitably affords fair compensation to all parties. 17 U.S.C. 114(f)(1), (4); 115(c)(3); 116(b); 118(b); and 119(c). A statutory rate, however, need not mirror a freely negotiated marketplace rate—and rarely does because it is a mechanism whereby Congress implements policy considerations which are not normally part of the calculus of a marketplace rate. See 115 Rate Adjustment Proceeding, 46 FR 10466 (1981) (determining that the mechanical license regulates the price of music to lower the entry barriers for potential users of that music).

The creation of the digital performance right embodied similar considerations. It affords the copyright owners some control over the distribution of their creative works through digital transmissions, then balances the owners' right to compensation against the users' need for access to the works at a price that would

not hamper their growth.

In the current proceeding, the Panel considered proposed marketplace benchmarks, including all the economic data, and weighed the record evidence in light of the statutory objectives. This process is structured so that it affords the copyright owners reasonable compensation and the users a fair income-the purpose of the second statutory objective. See 17 U.S.C. 801(b)(1)(B). Accordingly, a recommended rate so calculated achieves this final statutory objective, in that it reflects the balance between fair compensation for the owners and a fair return to the users. As fully discussed above, the Register supports the Panel's methodology in reaching its determination (although she rejects as arbitrary the Panel's application of that methodology in some respects) and has adopted the Panel's overall approach in making her recommendation to the Librarian.

#### d. The Register's Recommended Rate

Rate setting is not a precise science. National Cable Television Assoc. Inc., 724 F.2d 176, 182 (D.C. Cir. 1983). ("Ratemaking generally 'is an intensely practical affair.' The Tribunal's work particularly, in both ratemaking and royalty distributions, necessarily involves estimates and approximations. There has never been any pretense that the CRT's rulings rest on precise mathematical calculations; it suffices that they lie within a 'zone of reasonableness' "). It requires evaluating the marketplace points of reference and

tempering the choice of any proposed rate with the policy considerations underpinning the objectives of Congress in creating the license. Because this process requires the consideration of numerous factors, the CARPs, as the Tribunal before them, have considerable discretion in setting rates designed to achieve specific statutory objectives. See RIAA v. ČRT, 662 F.2d at 9 ("To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, the Tribunal is free to choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a 'zone of reasonableness' '').

Discretion in setting rates, however, assumes that the underlying rationale for making a determination is sounda finding which the Register could not make in this proceeding because the Panel's undue reliance on the rate in the DCR license agreement, and its subsequent manipulation of the license fee, were arbitrary actions. See Permian Basin Area Rate Cases, 390 U.S. 747 (1968) (Rate setting agency allowed to use a variety of regulatory methods in setting rates provided that the result is not arbitrary or unreasonable). Consequently, the Register recommended that the Librarian reject the Panel's determination, which he did, and set a new rate.

In formulating her recommendation as to the appropriate rate for the digital performance license, the Register, like the Panel, considered the relevant marketplace points of reference offered into evidence.33 These reference points guided the Register in her task of setting a reasonable rate for the performance of digital sound recordings. But unlike the Panel, the Register gave more consideration to the rates paid for the performance right in the musical compositions, because these rates represent an actual marketplace value for a public performance right in the digital arena, albeit not the digital performance right in sound recordings. The Register took this approach after finding that the DCR negotiated license fee could not reflect accurately the

<sup>33</sup> The values of the relevant marketplace reference points, the DCR negotiated license fee and the license fee for the performance of the musical works, are subject to a protective order, and hence, their numerical values have been omitted. Nevertheless, the values of the performance rights embodied in these licenses figure prominently in the determination of the value for the digital performance right in sound recordings. In fact, the sum of these license fees establishes the outer boundary of the "zone of reasonableness" for this proceeding.

marketplace value of the digital performance right since no such legal right existed at the time the rate was negotiated, and the negotiating parties were unwilling to enter a licensing agreement for the digital performance right absent a partnership agreement.

Nevertheless, the Register did take into account the negotiated value of the digital performance right in the DCR license in making her determination that the statutory rate should be less than the value of the performance rights of the musical compositions. This determination followed from a review of the evidence on the relative value of the sound recording component and the musical works component of a phonorecord, which failed to support the record industry's assertion that the marketplace valued the sound recording component more than the musical works component. This being so, the Register evaluated the only other relevant marketplace point of reference, the negotiated DCR license fee. Because this fee is considerably lower than the total value of the marketplace license fees which each Service pays for the right to publicly perform the musical works, and while not a true marker for the value of the digital performance right, it supports a determination that the value of the performance right in the sound recording does not exceed the value of the performance right in the musical works.

In addition to these factors, the Register considered the statutory criteria and Congress' intent in creating the license. Unlike the Panel, which found that all four factors support a low rate, the Register found that the copyright owners did more "[t]o maximize the availability of creative works to the public," see 17 U.S.C. 801(b)(1)(A), and should receive fair compensation for their contributions in this area. However, the three remaining factors, especially the fourth factor, which requires that the rate be set "[t]o minimize any disruptive impact on the structure of the industries involved,' see 17 U.S.C. 801(b)(1)(D), compels the Register to consider the economic health of the digital audio transmission industry.

The evidence clearly shows that the Services have been facing an uphill battle in their struggle to achieve profitability. At this time, the digital audio industry is still struggling to create a sustainable subscriber base, and as yet, no digital audio transmission service has shown a profit nor does any service expect to reach profitability in the near future. Unfortunately, the actual state of financial health within the industry is difficult to ascertain from

the projected budgets put forward by the Services. Nevertheless, the 5% rate proposed by the Panel did not draw an objection from the Services, indicating a reasonable state of financial health to absorb at least a rate set at this level.

For the foregoing reasons, the Register recommends a rate that will not harm the industry at this critical point in its development and finds that a 6.5% rate achieves this aim and meets all other statutory objectives. This rate reflects the deference the Register accorded the value of the performance right in the musical works, the consideration of the financial health of the industry, and the recognition that copyright owners contribute the lion share's to the creation of new works for the public's enjoyment.

#### e. Terms

On June 2, 1997, the Services submitted general comments concerning proposed terms and conditions for the digital performance license pursuant to the March 28, 1997, Order of the Copyright Office. They later proposed specific terms concerning how the Services would make payment, how often they would pay, and procedures for verifying the accuracy of those payments, including terms on confidentiality, recordkeeping, and audits. Services PF ¶¶ 122–128; 284– 304. Included in their submissions were proposed terms establishing a payment schedule for the distribution of royalties to the featured artists and the nonfeatured musicians and vocalists. Services PF ¶¶ 287–289. The Panel refused to adopt these terms because the Services failed to present any evidence or testimony to support their proposal, but more importantly, because the Panel found that "the issue of the timing of payments from the RIAA Collective to artists and other performers is not within the scope of this proceeding." Report at 56 n.21.

RIAA made similar proposals on how to administer the royalty payments, but offered two additional considerations, a minimum fee "equivalent to the rate adopted in this proceeding" and a late fee for untimely payments. RIAA PF¶¶ 125–160. The Panel rejected the proposal to impose a minimum fee, see discussion supra, but accepted the RIAA proposal to impose a 1.5% late fee.

The Register supports and adopts the Panel's decision to reject the Services' proposed terms concerning further distribution of royalties to certain copyright owners by RIAA on the grounds that no evidence was introduced in support of the terms. Because this is a sufficient ground on which to reject the Services' proposed

term, the Register need not address the Panel's determination that it lacked the authority to consider a payment schedule for the performing artists. The Register also need not address the Panel's rejection of the minimum fee because no party chose to challenge the Panel's decision. See n. 7, supra.

The parties' reactions to the terms adopted by the Panel

The Services did not file a post-panel motion to modify or set aside the Panel's determination, thereby signaling their acceptance of the Panel's resolution of any conflict between the parties concerning the terms. However, RIAA has raised two key items for further review by the Librarian: The adoption of a term which defines when copyright infringement occurs for purposes of the statutory digital performance license and the creation of a payment schedule that allows the Services to spread out their payment for the performances made between February 1996, the effective date of the Act, and November 1997, the month the Panel filed its report with the Librarian of Congress.34 Petition at 7 n. 1.

The Panel's adoption of two of its terms was either arbitrary or contrary to law

The Register has determined that the Panel had no authority to set terms which attempt to delineate the scope of copyright infringement for the digital performance license, or alter a payment schedule already set by law. See Report ¶¶187–189, 206(a), (b).

1. Payment of arrears. The Panel adopted a term which allowed the Services to make back payments over a 30-month period for use of the sound recordings between February 1, 1996, and the end of the month in which the royalty rate is set and to delay the first payment for six months. Report ¶¶ 187, 206(a). The Register has determined, however, that adoption of this term is contrary to law.

Section 114(f)(5)(B) of the Copyright Act states that "(a)ny royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set." The "arrears" referenced in the statute refers to the copyright liability that accrued to the Services for those performances made since February 1, 1996, the effective date of the Act, and the end of the month in which the royalty rate is set.

<sup>&</sup>lt;sup>34</sup>RIAA did not object to the Panel's refusal to grant its request for a minimum fee in its petition, nor does the Register find any reason to question the Panel's determination. As discussed supra, the Register finds the Panel's disposition on this issue to be well reasoned and supported by the evidence.

In spite of the express statutory language, the Panel fashioned a payment schedule to ease the burden on the Services in meeting this obligation.

The Panel found support for its action in the 1980 jukebox rate adjustment proceeding, in which the CRT raised the rate from \$8 to \$50, but did so in a progressive fashion. Report ¶ 186. The determination required the jukebox operators to make the first increased payment of \$25 per jukebox per year on January 1, 1982, and a second \$25 annual payment the following year. The CRT did not require the full \$50 annual rate to be paid until January 1, 1984, approximately three years after setting the rate. 46 FR 884, 888, 890 (1981). The Tribunal adopted the phase-in payment schedule relying on its duty to set rates in accordance with the statutory objectives. It found that the gradual increase in payments furthered the objective concerned with minimizing the disruptive impact on the industries. Id. at 889. The Panel relied upon this CRT decision in adopting its phase-in program for payment of the arrears over a 30-month period.

The Services embrace the Panel's reliance on past CRT precedent for the inclusion of the phase-in payment term and claim that RIAA also agreed to allow the Services to make the "back payments" over a period of time. Reply to Petition at 14 n. 5. This assertion, however, is inaccurate. RIAA agreed that a phase-in schedule would be appropriate for the minimum fee, but never posited such a payment schedule for the arrears. See Tr. 2829 (RIAA closing argument). By comparing RIAA's statement on the proposal for making payments of a minimal fee,

The recording industry proposes that the minimum fee be phased in to help minimize any disruptive effect from the fact that, for the first time, the services are going to be paying a fair fee—in fact, any fee at all for the performance of sound recordings,

Id. at 2829, see also RIAA PF ¶¶ 150–152, with its statement concerning the timing of the payment of arrears,

In terms of the timing of the back payment, the statute leaves absolutely no question as to when the back payment from the services is due for the period from the Act's effective date through the date on which the Panel issues its decision.

Section 114(f)(5)(B) says that "any royalty payment in arrears shall be made on or before the 20th day of the month next succeeding the month in which the royalty fees are set."

Id. at 2829–2830, see also RIAA PF ¶ 157, it is absolutely clear that RIAA never agreed to a payment scheme for the arrears that would allow the Services to make partial payments over a 30-month period.

In another attempt to support the Panel's conclusion, the Services construe the statutory provision broadly and argue that arrears refers to "any royalty payment in arrears" and "does not specifically cover the back payment for the extended period between the 1995 Act's February 1, 1996, effective date and the time the Panel sets the performance rate." Services RF ¶ 157. This assertion, however, is inconsistent with the legislative history and the plain language of the statute.

Thus, the Panel had no authority to create a graded payment schedule for the payment of the arrears because the statute expressly stated when payment was to occur. Section 114(f)(5)(B) states, without qualification, that "[a]ny royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.' (emphasis added). It is a wellestablished principle that, in interpreting the meaning of a statute, the language of the law is the best evidence of its meaning. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989); Norman S. Singer, Sutherland Statutory Construction sec. 46.01 (5th ed. 1992 rev.) Because the statutory language is clear on its face, the Register finds that the Panel's and the Services' reliance on the CRT 1980 jukebox decision is arbitrary and contrary to well-established principles of law. And even if the statutory language were ambiguous, the legislative history supports the Register's and RIAA's interpretation of section 114(f)(5)(B).35

Because the Panel's action exceeded its authority, the Register recommends that the Librarian reject the proposed term because its adoption would be

contrary to law.

2. Copyright infringement. The Panel adopted a term which stated that "[i]f a Service fails to make timely payments, it will be subject to liability for copyright infringement. Such liability will only come about, however, for knowing and willful acts which materially breach the statutory license terms." Report ¶ 206(b). The Register has determined that this term is contrary to law.

RIAA contends that the Panel "usurped the authority of Article III courts by attempting to define the circumstances where the Services are liable for copyright infringement." Petition at 7 n.1. In response, the

Services argue that the DPRSRA supports the Panel's suggestion that minor technical violations should not result in an infringement action. Services Reply to Petition at 14 n.5. Specifically, the Services point to section 114(j)(7)(B) which limits complement to the performance of sound recordings from a single album, which Congress included "[t]o avoid imposing liability for programming that unintentionally may exceed the complement." S. Rep. No. 104–128, at 35 (1995).

The Register acknowledges that Congress made provisions to protect users from copyright liability for programming that unintentionally exceeds the complement, see 17 U.S.C. 114(j)(7), but she finds it impermissible to expand a particular provision of the copyright law which limits copyright liability under one set of circumstances to include additional limitations not contemplated by Congress. Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F.2d 667, 670 (5th Cir.) cert. denied, 423 U.S. 841 (1975) ("We begin by noting that the compulsory license provision is a limited exception to the copyright holder's exclusive right to decide who shall make use of his composition. As such, it must be construed narrowly, lest the exception destroy, rather than prove, the rule. Thus we should neither expand the scope of the compulsory license provision beyond what Congress intended in 1909, nor interpret it in such a way as to frustrate that purpose").36

But more importantly, in examining the legislative history, it is clear that Congress meant for the CARP to have limited authority in adopting reasonable

By terms, the Committee means generally such details as how payments are to be made, when, and other accounting matters (such as are prescribed in section 115). In addition, the Librarian is to establish related terms under section 114(f)(2). Should additional terms be necessary to effectively implement the statutory license, the parties may negotiate such provisions or the CARPs may prescribe them.

S. Rep. No. 104–128, at 30 (1995). This language clearly indicates that the CARP had authority to set reasonable terms only so far as those terms insured the smooth administration of the license. There is no indication in the statutory language or in the legislative history that the scope of the terms should go

<sup>&</sup>lt;sup>35</sup> S. Rep. No. 104–128, at 30 (1995) ("if the royalty fees have not been set at the time of performance, the performing entity must agree to pay the royalty fee to be determined under this subsection by the twentieth day of the month following the month in which the rates are set").

<sup>&</sup>lt;sup>36</sup> Congress defined the scope of the digital performance right granted to the copyright owner and under what circumstances a digital audio service infringes that right. See, e.g., 17 U.S.C. 114 (d) and (e)(5).

beyond the creation of a workable administrative system and reach substantive issues, such as defining the scope of copyright infringement for those availing themselves of the statutory license.

Congress carefully delineated the scope of the digital performance right and the limitations on that right within the provisions of the statute. Section 114(d), entitled "Limitations on Exclusive Right," states with specificity when a performance by means of a digital audio transmissions is not an infringement, just as section 114(f)(5) defines when a public performance of a sound recording by means of a nonexempt subscription digital transmission is not an infringement. For the Panel to fashion a term further delineating the issue of copyright infringement when Congress has already acted is an improper exercise of authority beyond that granted under the statute.

Accordingly, the Register finds that the Panel had no authority to set a term construing the meaning of copyright infringement for purposes of section 114. See Report ¶¶ 188, 206(b). Because the Panel's action exceeded its authority, the Register recommends that the Librarian reject the proposed term because its adoption would be contrary to law.

#### f. Other Issues

1. Effective date. Section 114(f)(5)(B) states that payments in arrears for the performance of sound recordings prior to the setting of a royalty rate are due on a date certain in the month following the month in which the rate is set. Both the Panel and RIAA assume that the "date the royalty rate is set" is the date the Panel submits its report to the Librarian of Congress. See Report ¶ 186; Petition at 7 n.1. The Register disagrees with this assessment.

Section 802(g) governs judicial review of the Librarian's decision with respect to CARP determinations. The section allows an aggrieved party 30 days to file an appeal with the United States Court of Appeals for the District of Columbia Circuit, but does not relieve a party of his or her obligation to make royalty payments during the pendency of the appeal. In the event that no appeal is taken, the section states that "the decision of the Librarian is final, and the royalty fee \* \* \* shall take effect as set forth in the decision." 17 U.S.C. 802(g). Neither section 114 nor chapter 8 makes further reference to the possible effective date of royalty rates.

As discussed in an earlier order setting a rate for the satellite compulsory license, 17 U.S.C. 119, the

Register interprets the decision referenced in section 802(g) "to mean the decision of the Librarian, and not the decision of the CARP, since section 802(g) only refers to the decision of the Librarian. Consequently, the Register concludes that only the Librarian of Congress has the authority to set the effective dates of the royalty rates in this proceeding." Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55754 (1997). See also KIAA v. CRT. 662 F.2d at 14 ("When the statute authorizing agency action fails to specify a timetable for effectiveness of decisions, the agency normally retains considerable discretion to choose an effective date") (footnote omitted). This reasoning applies equally to the current proceeding, since no other guidance for setting the effective date is to be found in the statute or the legislative history.

The Register has pondered the question of an appropriate effective date and believes that the Panel's concern with minimizing the disruptive impact on the structure of the industries involved was well founded. See discussion supra concerning the economic health of the Services. Consequently, the Register proposes an effective date of June 1, 1998, which would require the Services to make full payment of the arrears on July 20, 1998, in addition to the payment for the month of June 1998, with subsequent payments to RIAA on the 20th day of each subsequent month. This date provides the Services with a measured amount of time to provide for any necessary adjustments in their business operations to meet their copyright obligations.

The Tribunal took a similar course when it set the effective date for implementing the rate increase for making and distributing phonorecords approximately six months after publication of its final rule. Section 115 Rate Adjustment Proceeding, 46 FR 10486 (1981). The Tribunal chose not to implement the rate change immediately in order to minimize the effect of the upward adjustment on the copyright users. The United States Court of Appeals for the District of Columbia Circuit upheld the Tribunal's decision to postpone the effective date because:

The Tribunal's opinion demonstrates its concern "to minimize disruptive impacts" on the recording industry, and its view that the effective date of a royalty adjustment should be arranged so as to be "less disruptive to the industries." Although the Tribunal concluded that a single increase to the full four-cent rate would not be unduly disruptive, it was within the Tribunal's discretion to give the industry adequate lead time to prepare for the increase.

RIAA v. CRT, 662 F.2d at 14 (citations omitted).

2. Value of an individual performance

of a sound recording.
The Register notes that the Panel stopped prematurely in its consideration of the value of the public performance of a sound recording. Its entire inquiry focused on the value of the "blanket license" for the right to perform the sound recording, without once considering the value of the individual performance-a value which must be established in order for the collecting entity to perform its function not only to collect, but also to distribute royalties. Consequently, the Register has made a determination that each performance of each sound recording is of equal value and has included a term that incorporates this determination.

To do otherwise requires the parties to establish criteria for establishing differential values for individual sound recordings or various categories of sound recordings. Neither the Services nor RIAA proposed any methodology for assigning different values to different sound recordings. In the absence of an alternative method for assessing the value of the performance of the sound recording, the Register has no alternative but to find that the value of each performance of a sound recording has equal value. Furthermore, the structure of the statute contemplates direct payment of royalty fees to individual copyright owners when negotiated license agreements exist between one or more copyright owner and one or more digital audio service. To accommodate this structure in the absence of any statutory language or legislative intent to the contrary, each performance of each sound recording must be afforded equal value.

This determination does not alter the statutory provision that specifies how the copyright owner of the right to publicly perform the sound recording must allocate the statutory fees among the recording artists. See 17 U.S.C.

114(f)(2). 3. Audit of the designated collective. Although the membership of the collective represented by RIAA includes over 275 record labels which create more than 90 percent of all legitimate sound recordings sold in the United States, it does not represent the record companies responsible for the creation of the remaining 10% of the sound recordings. Report ¶ 20. Nevertheless, the Panel found, and the Register concurs, that the parties' suggestion to designate a single entity to collect and to distribute the royalty fees creates an efficient administrative mechanism. Report ¶ 184.

It is common practice, however, for the government body making such designations to implement safeguards to monitor the functions of the collective.37 To this end, the Register recommends new terms that afford the copyright holders a right to audit the collective's practices in handling the royalty fees. The Register takes this step to insure copyright holders access to the records of the organization charged with the fiduciary responsibility of making an equitable distribution among those entitled to receive a portion of the funds, while at the same time preserving the confidentiality of the organization's business records. These terms mirror those formulated by the parties and adopted by the Panel which allow the collective to audit the business records of the Services to insure proper payment of the royalties.

 Deduction of administrative costs. Neither the parties nor the Panel gave any consideration to the manner in which the collecting entity would deduct from payments to copyright owners its costs of administering the funds it receives and disburses. Nevertheless, the Panel should have addressed this key term of the compulsory license. Therefore, the Register finds it necessary to establish an additional term that permits the collecting entity to deduct from the royalties it pays to copyright owners the costs it incurs in administering the funds, so long as the costs deducted are reasonable and are no more than the actual costs incurred by the collecting entity

5. Unknown copyright owners. The digital audio services will pay royalties on all sound recording performances without regard to the further disbursement of these fees to the numerous copyright holders. The collective will have little difficulty in identifying and locating the overwhelming majority of the copyright holders entitled to receive a portion of the fees, since the membership of the collective represents the interests of the copyright holders in over 90% of all sound recordings. Problems may arise. however, as RIAA attempts to identify and locate the copyright holders to the remaining 10% of the sound recordings. In anticipation of the likelihood that

RIAA will not be able to locate all copyright holders, the Register recommends the adoption of a term that segregates the fees for unknown copyright owners into a separate trust account for future distribution to the rightful owner, or in the event that the owner is not found, allows the collective to use the funds after a period of three years, see 17 U.S.C. 507(b), to offset its administrative costs associated only with the collection and distribution of royalty fees collected under the statutory license.

6. Rates for other types of digital audio services. The rates and terms announced in this notice apply to DCR, DMX, and Muzak, the three digital audio transmission services participating in this proceeding, and to any other digital audio transmission service that avails itself of the compulsory license, provided that the service is of the same type. The Register raises this point to avoid any confusion over the Panel's statement which implies that the rates and terms set in this proceeding "shall be binding on all copyright owners of sound recordings and entities performing sound recording[s]." Report ¶ 1, citing 17 U.S.C. 114(f)(2). A general provision, however, must be read in conjunction with more specific statutory language; in this case, section 114(f)(4)(A), which provides for additional rate adjustment proceedings upon petition from any copyright owner or entity performing sound recordings when a new type of digital audio transmission becomes or is about to become operational.

#### VI. Conclusion

In considering the evidence in the record, the contentions of the parties, and the statutory objectives, the Register of Copyrights recommends that the Librarian adopt a statutory rate for the digital performance of sound recordings, pursuant to 17 U.S.C. 114, of 6.5% of gross revenues from subscribers residing within the United States.

In addition, the Register recommends that the Librarian adopt the reasonable terms propounded by the Panel except for those terms concerning the payment schedule for arrears and potential limitations on the scope of copyright infringement. The Register also recommends setting June 1, 1998, as the effective date for implementing the new rate and terms in order to ease the burden on each Service on meeting its initial obligations under the statutory license.

## VII. The Order of the Librarian of Congress

Having duly considered the recommendations of the Register of Copyrights regarding the Report of the Copyright Arbitration Royalty Panel in the matter to set reasonable terms and rates for the digital performance right in sound recordings, 17 U.S.C. 114, the Librarian of Congress fully endorses and adopts her recommendation to set the rate for the statutory license at 6.5% of gross revenues from U.S. residential subscribers. This rate shall apply to those digital audio services represented in this proceeding and any other eligible digital audio service of the same type that subsequently enters the market and makes use of the statutory license. The Librarian of Congress also adopts the Register's recommendation to reject the terms concerning potential limits on what constitutes copyright infringement and the proposed schedule for the payment of the arrears.

For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing this order which adopts new Copyright Office regulations setting reasonable terms and rates for the digital performance right in sound recordings.

#### List of Subjects in 37 CFR Part 260

Copyright, Digital Audio Transmissions, Performance Right, Sound Recordings

#### **Final Regulation**

In consideration of the foregoing, part 260 of 37 CFR is added to read as follows:

#### PART 260—USE OF SOUND RECORDINGS IN A DIGITAL PERFORMANCE

Sec.

260.1 General.

260.2 Royalty fees for the digital performance of sound recordings.

260.3 Terms for making payment of royalty fees.

260.4 Confidential information and statements of account.

260.5 Verification of statements of account.

260.6 Verification of royalty payments.

260.7 Unknown copyright owners.

Authority: 17 U.S.C. 114, 801(b)(1).

#### §260.1 General.

(a) This part 260 establishes terms and rates of royalty payments for the public performance of sound recordings by nonexempt subscription digital transmission services in accordance with the provisions of 17 U.S.C. 114 and 801(b)(1).

<sup>&</sup>lt;sup>37</sup> A government's general policy toward the regulation of collective administration should be to limit government intervention to only "that which is necessary to facilitate the effective operations of the collective administration organization, consistent with the private character of the rights involved, while checking possible abuses by that collective in the least intrusive manner possible within" the overall context of the society involved. David Sinacore-Guinn, Collective Administration of Copyrights and Neighboring Rights, 544 (1993).

(b) Upon compliance with 17 U.S.C. 114 and the terms and rates of this part, a nonexempt subscription digital transmission service may engage in the activities set forth in 17 U.S.C. 114.

## § 260.2 Royalty fees for the digital performance of sound recordings.

(a) Commencing June 1, 1998, the royalty fee for the digital performance of sound recordings by nonexempt subscription digital services shall be 6.5% of gross revenues resulting from residential services in the United States.

(b) A nonexempt subscription digital transmission service (the "Licensee") shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received after the due date. Late fees shall accrue from the due date until payment is received.

(c)(1) For purposes of this section, gross revenues shall mean all monies derived from the operation of the programming service of the Licensee and shall be comprised of the following:

(i) Monies received by Licensee from Licensee's carriers and directly from residential U.S. subscribers for Licensee's programming service;

(ii) Licensee's advertising revenues (as billed), or other monies received from sponsors if any, less advertising agency commissions not to exceed 15% of those fees incurred to recognized advertising agency not owned or controlled by Licensee:

(iii) Monies received for the provision of time on the Programming Service to any third party;

(iv) Monies received from the sale of time to providers of paid programming such as infomercials:

(v) Where merchandise or anything or service of value is received by licensee in lieu of cash consideration for the use of Licensee's programming service, the fair market value thereof or Licensee's prevailing published rate, whichever is less;

(vi) Monies or other consideration received by Licensee from Licensee's carriers, but not including monies received by Licensee's carriers from others and not accounted for by Licensee's carriers to Licensee, for the provision of hardware by anyone and used in connection with the Programming Service;

(vii) Monies or other consideration received for any references to or inclusion of any product or service on the programming service; and

(viii) Bad debts recovered regarding paragraphs (c)(1) (i) through (vii) of this section.

(2)Gross revenues shall include such payments as are in paragraphs (c)(1) (i) through (viii) of this section to which Licensee is entitled but which are paid to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee's carriers for the programming service. Licensee shall be allowed a deduction from "gross revenues" as defined in paragraph (c)(1) of this section for affiliate revenue returned during the reporting period and for bad debts actually written off during reporting period.

(d) During any given payment period, the value of each performance of each digital sound recording shall be the

## § 260.3 Terms for making payment of royalty fees.

(a) All royalty payments shall be made to a designated agent(s), to be determined by the parties through voluntary license agreements or by a duly appointed Copyright Arbitration Royalty Panel pursuant to the procedures set forth in subchapter B of 37 CFR, part 251.

(b) Payment shall be made on the twentieth day after the end of each month for that month, commencing with the month succeeding the month in which the royalty fees are set.

(c) The agent designated to receive the royalty payments and the statements of account shall have the responsibility of making further distribution of these fees to those parties entitled to receive such payment according to the provisions set forth at 17 U.S.C. 114(g).

(d) The designated agent may deduct reasonable costs incurred in the administration of the distribution of the royalties, so long as the reasonable costs do not exceed the actual costs incurred by the collecting entity.

(e) Commencing June 1, 1998, and until such time as a new designation is made, the Recording Industry Association of America, Inc. shall be the agent receiving royalty payments and statements of accounts.

## § 260.4 Confidential information and statements of account.

(a) For purposes of this part, confidential information shall include statements of account and any information pertaining to the statements of account designated as confidential by the nonexempt subscription digital transmission service filing the statement. Confidential information shall also include any information so designated in a confidentiality agreement which has been duly executed between a nonexempt subscription digital transmission service and an interested party, or between one or more interested parties; *Provided* that

all such information shall be made available, for the verification proceedings provided for in §§ 260.5 and 260.6 of this part.

(b) Nonexempt subscription digital transmission services shall submit monthly statements of account on a form provided by the agent designated to collect such forms and the monthly royalty payments.

(c) Å statement of account shall include only such information as is necessary to verify the accompanying royalty payment. Additional information beyond that which is sufficient to verify the calculation of the royalty fees shall not be included on the statement of account.

(d) Access to the confidential information pertaining to the royalty payments shall be limited to:

(1) Those employees of the designated agent who are not also employees or officers of a sound recording copyright owner or performing artist, and who, for the purpose of performing their assigned duties during the ordinary course of business, require access to the records; and

(2) An independent and qualified auditor who is not an employee or officer of a sound recording copyright owner or performing artist, but is authorized to act on behalf of the interested copyright owners with respect to the verification of the royalty payments.

(e) The designated agent shall implement procedures to safeguard all confidential financial and business information, including but not limited to royalty payments, submitted as part of the statements of account. Confidential information shall be maintained in locked files.

(f) Books and records relating to the payment of the license fees shall be kept in accordance with generally accepted accounting principles for a period of three years. These records shall include, but are not limited to, the statements of account, records documenting an interested party's share of the royalty fees, and the records pertaining to the administration of the collection process and the further distribution of the royalty fees to those interested parties entitled to receive such fees.

## § 260.5 Verification of statements of account.

(a) General. This section prescribes general rules pertaining to the verification of the statements of account by interested parties according to terms promulgated by a duly appointed copyright arbitration royalty panel, under its authority to set reasonable terms and rates pursuant to 17 U.S.C.

114 and 801(b)(1), and the Librarian of Congress under his authority pursuant to 17 U.S.C. 802(f).

(b) Frequency of verification. Interested parties may conduct a single audit of a nonexempt subscription digital transmission service during any given calendar year.

(c) Notice of intent to audit. Interested parties must submit a notice of intent to audit a particular service with the Copyright Office, which shall publish in the Federal Register a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the interested parties' notice. Such notification of intent to audit shall also be served at the same time on the party to be audited.

(d) Retention of records. The party requesting the verification procedure shall retain the report of the verification

for a period of three years.

(e) Acceptable verification procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent auditor, shall serve as an acceptable verification procedure for all parties.

(f) Costs of the verification procedure. The interested parties requesting the verification procedure shall pay for the cost of the verification procedure, unless an independent auditor concludes that there was an underpayment of five (5) percent or more; in which case, the service which made the underpayment shall bear the costs of the verification procedure.

costs of the verification procedure.
(g) Interested parties. For purposes of this section, interested parties are those copyright owners who are entitled to receive royalty fees pursuant to 17 U.S.C. 114(g), their designated agents, or the entity designated by the copyright arbitration royalty panel in 37 CFR 260.3 to receive and to distribute the royalty fees.

#### § 260.6 Verification of royalty payments.

(a) General. This section prescribes general rules pertaining to the verification of the payment of royalty fees to those parties entitled to receive such fees, according to terms promulgated by a duly appointed copyright arbitration royalty panel, under its authority to set reasonable terms and rates pursuant to 17 U.S.C. 114 and 801(b)(1), and the Librarian of Congress under his authority pursuant to 17 U.S.C. 802(f).

(b) Frequency of verification. Interested parties may conduct a single audit of the entity making the royalty payment during any given calendar year. (c) Notice of intent to audit. Interested parties must submit a notice of intent to audit the entity making the royalty payment with the Copyright Office, which shall publish in the Federal Register a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the interested parties' notice. Such notification of interest shall also be served at the same time on the party to be audited.

- (d) Retention of records. The party requesting the verification procedure shall retain the report of the verification for a period of three years.
- (e) Acceptable verification procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent auditor, shall serve as an acceptable verification procedure for all parties.
- (f) Costs of the verification procedure. The interested parties requesting the verification procedure shall pay for the cost of the verification procedure, unless an independent auditor concludes that there was an underpayment of five (5) percent or more; in which case, the entity which made the underpayment shall bear the costs of the verification procedure.
- (g) Interested parties. For purposes of this section, interested parties are those copyright owners who are entitled to receive royalty fees pursuant to 17 U.S.C. 114(g), or their designated agents.

#### § 260.7 Unknown copyright owners.

If the designated collecting agent is unable to identify or locate a copyright owner who is entitled to receive a royalty payment under this part, the collecting agent shall retain the required payment in a segregated trust account for a period of three years from the date of payment. No claim to such payment shall be valid after the expiration of the three year period. After the expiration of this period, the collecting agent may use the unclaimed funds to offset the cost of the administration of the collection and distribution of the royalty fees.

Dated: April 17, 1998.

Marybeth Peters,

Register of Copyrights.

James H. Billington,

The Librarian of Congress.

[FR Doc. 98–12266 Filed 5–7–98; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 52

[FRL 325-6]

## Approval and Promulgation of State Implementation Plans

#### CFR Correction

In title 40 of the Code of Federal Regulations, part 52 (§ 52.1019 to end), revised as of July 1, 1997, in appendix D to part 52, on page 610, in the first and second columns, equations d–1 and d–2 were inadvertently omitted. Additionally, the second line in the legend for Equation D–2 was incorrectly printed. The missing equations and corrected line should read as follows:

#### Appendix D to Part 52—Determination of Sulfur Dioxide Emissions From Stationary Sources by Continuous Monitors

$$\frac{\sum_{i=1}^{n} x_i}{n}$$
 Equation D-1

C.I.<sub>95</sub> = 
$$\frac{t._{975}}{n\sqrt{n-1}} \sqrt{n(\sum \chi_i^2) - (\sum \chi_i)^2}$$

Equation D-2

\* \* \* \* \* \* '.975 = '1-a/2, and \* \* \* \* \*

BILLING CODE 1505-01-D

#### DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 980318066-8066-01; I.D. 022698A]

#### Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Framework Adjustment 25; Correction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; correction.

**SUMMARY:** This rule removes regulatory language inadvertently added, clarifies the raised footrope requirement for Small Mesh Area 1 & 2, and corrects an

# Before the UNITED STATES COPYRIGHT OFFICE LIBRARY OF CONGRESS Washington, D.C.

In	the	Matter	of:	
***		LIAGRAGO	~	

NOTICE AND RECORDKEEPING FOR USE OF SOUND RECORDINGS UNDER STATUTORY LICENSE

Docket No. RM 2002-1A

## REPLY COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

Volume 1 of 4

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April 26, 2002

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#### TABLE OF ABBREVIATIONS

ABBREVIATION NAME

AFM American Federation of Musicians of the United States

and Canada

AFTRA American Federation of Television and Radio Artists

ARBA Adventist Radio Broadcasters Association
CARP Copyright Arbitration Royalty Panel

CBI Collegiate Broadcasters, Inc.

CD PROs Compact Disc Promotional Releases

CD-R Compact Disc-Recordable

College Broadcasters College and University Radio Broadcasters Webcasting

Under Statutory License

CPR Christian Pirate Radio
DAS Digital Automation Systems
DiMA Digital Media Association

DMCA Digital Millennium Copyright Act

EFF Electronic Frontier Foundation, the Electronic Privacy

Information Center, Fresno Free College Foundation,

KFCF (88.1 FM) and KPFA Radio

FMC Future of Music Coalition

Gladstone Philip Gladstone

Harvard Radio Broadcasting Company

IFPI International Federation of the Phonographic Industry

ISRC International Standard Recording Code

Librarian of Congress

Mayflower Mayflower Hill Broadcasting Corporation
NFCB National Federation of Community Broadcasters

NPRM Notice and Recordkeeping for Use of Sound Recordings

Under Statutory License, 67 Fed. Reg. 5761 (Feb. 7,

2002)

NRBMLC National Religious Broadcasters Music License

Committee

Original Determination Notice and Recordkeeping for Digital Subscription

Transmissions, Interim Regulations, 63 Fed. Reg. 34,

289 (June 24, 1998)

PROs Performing Rights Organizations

Radio Broadcasters The Radio Broadcasters (Bonneville International

Corporation, National Association of Broadcasters,

Susquehanna Radio Corp., Clear Channel Communications, Inc., NRBMLC and Salem

Communications Corp.)

RFA Regulatory Flexibility Act

RIAA Recording Industry Association of America

RLI Royalty Logic, Inc.

SDARS Joint Comments of Sirius Satellite Radio Inc. and XM

Satellite Radio, Inc.

Sirius Satellite Radio Inc.

Sony Music Entertainment, Inc.

Unions AFM and AFTRA

UPC Universal Product Code

Webcaster CARP Copyright Arbitration Royalty Panel in the Matter of

Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No.

2000-9 CARP DTRA 1 & 2

Webcaster CARP Report Report of the Copyright Arbitration Royalty Panel in the

Matter of Rate Setting For Digital Performance Right In Sound Recordings And Ephemeral Recordings, Docket

No. 2000-9 CARP DTRA 1 & 2 (Feb. 20, 2002)

XM Satellite Radio, Inc.

# Before the UNITED STATES COPYRIGHT OFFICE LIBRARY OF CONGRESS Washington, D.C.

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In the Matter of:	)	
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NOTICE AND RECORDKEEPING FOR	)	Docket No. RM 2002-1A
USE OF SOUND RECORDINGS UNDER	)	
STATUTORY LICENSE	)	
	)	

## REPLY COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

The Recording Industry Association of America, Inc. ("<u>RIAA</u>"), on behalf of itself and its member companies, which create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States and on behalf of SoundExchange, 1 currently an unincorporated division of the RIAA, which has a separate, overlapping roster of members that are large, medium and small recording companies, respectfully submits these reply comments in response to the Copyright Office's Notice of Proposed Rulemaking dated February 7, 2002. Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 67 Fed. Reg. 5761 (Feb. 7, 2002) (the "NPRM").

<sup>&</sup>lt;sup>1</sup> SoundExchange licenses public performances and ephemeral recordings, and collects and distributes public performance and ephemeral recording revenue for such digital media as cable, satellite and the Internet. SoundExchange's board of directors is evenly divided between representatives of copyright owners and representatives of artists and nonfeatured musicians and vocalists. The board has decided to incorporate SoundExchange as a separate legal entity so that it is no longer a division of the RIAA.

#### I. INTRODUCTION

As the Copyright Office has explained, Congress has mandated that this proceeding must establish the "requirements for giving copyright owners reasonable notice of the use of their works for sound recordings under statutory license and for how records of such use shall be kept and made available to copyright owners." NPRM, 67 Fed. Reg. 5761.

Digital music services have enjoyed the benefits of the statutory licenses created by the DMCA for more than 3 years, but have not yet paid any royalties or filed any reports on their use of sound recordings. These services will soon begin to pay those royalties to which artists and copyright owners are entitled – as mandated by Congress. However, until the Copyright Office adopts the regulations that are the focus of this proceeding, it will be impossible to distribute these royalties to the entitled parties. Furthermore, unless these regulations require a sufficiently detailed and comprehensive level of usage reporting, truly accurate and equitable distributions to those entitled parties will also be impossible.

As RIAA explained in its initial comments, notice and recordkeeping regulations should meet three objectives: (1) permit copyright owners or their agents to collect the proper amount of statutory royalties; (2) permit collecting entities to distribute those royalties fairly and accurately; and (3) permit copyright owners to enforce the requirements of the statutory license. RIAA Comments at 5-16. It is the responsibility of the Copyright Office, with the aid of copyright owners <u>and</u> services, to establish regulations that meet these objectives. In its initial comments, RIAA explained in detail why its proposed regulations meet these objectives. Section II below expands on that reasoning by responding to specific issues raised in the initial round of comments.

Comments filed by services focus almost exclusively on the allegation that the proposed regulations would be unduly burdensome, attack RIAA's motives and attempt to shift much of the responsibility for usage reporting back to the copyright owners.<sup>2</sup> Indeed, in stark contrast to the RIAA, the services have failed entirely to propose any regulations that would provide for efficient and effective administration of the statutory license. Rather, the services complain that they are suffering under an unfair "burden of proof," and seem to labor under the misimpression that it is the copyright owners' and performers' burden to justify having any notice and recordkeeping regulations at all. Yet, it is the services that have a statutory obligation to provide information on their performances to the copyright owners. Remarkably, they have not so much as proposed any regulations, all the while building their businesses on the sound recordings owned by others for more than three years.<sup>3</sup>

As explained in Section III below, the services' claims of hardship are unfounded, as nearly all of them use automated systems that either already provide or can be easily modified to provide the data required under the proposed regulations. Moreover, all of the data necessary for the required reports is generally already in the possession of the services in one form or another. Section IV explains why the general suggestions made

<sup>&</sup>lt;sup>2</sup> Many of the initial comments also address other irrelevant issues, such as the recent CARP proceeding and proposed amendments to the Copyright Act, that have no bearing on this proceeding.

<sup>&</sup>lt;sup>3</sup> RIAA agreed to an extension of time for filing comments in this proceeding because DiMA and others expressed an interest in meeting to resolve or narrow the issues in this proceeding. Unfortunately, those parties were unprepared to discuss anything of substance at the meeting, stating that they had not yet spoken with their member or client webcasters. Moreover, these parties failed entirely to follow up this meeting with a response to RIAA after promising to do so in a matter of days. RIAA can only assume that the meeting was a pretext to delay this proceeding and for lawyers to gather information from RIAA for their filings, both of which are consistent with the webcasters' utter failure to date to even propose a way to fulfill their statutory obligation.

by the services regarding notice and recordkeeping requirements are not sufficient for the purpose of royalty collection and distribution.<sup>4</sup>

In an effort to reach consensus on these issues, accelerate the process of adopting regulations and distribute these royalties to the entitled artists and copyright owners, RIAA proposes in Section V several accommodations to aid services in their reporting requirements and to address concerns raised in the initial comments. Importantly, these accommodations will allow services to postpone providing reports of use of sound recordings under statutory license for either three or six months following the Copyright Office's adoption of regulations. While this delay will negatively impact copyright owners and performers, who have been waiting for years to receive their share of statutory royalties, RIAA hopes that these accommodations will be received in the spirit of compromise in which they are offered. RIAA will then be able to move forward and collect and distribute the royalties to which Congress has determined artists and copyright owners are entitled.

# II. RIAA HAS PROPOSED THAT SERVICES REPORT ONLY THAT DATA NECESSARY TO FULFILL THE PURPOSES OF THE STATUTORY LICENSE

Numerous commenting parties have stated that before the Copyright Office should adopt any regulations for notice and recordkeeping, the RIAA must demonstrate why it (or its members) needs information from services in order to collect and distribute

<sup>&</sup>lt;sup>4</sup> With respect to the specific questions raised by the Copyright Office in the NPRM, many commenting parties appear to take positions consistent with the RIAA's response laid out in its initial comments. Section VI explains the areas where agreement appears to be present.

statutory royalties.<sup>5</sup> For example, the Radio Broadcasters (Bonneville International Corporation, National Association of Broadcasters, Susquehanna Radio Corp., Clear Channel Communications, Inc., National Religious Broadcasters Music License Committee ("NRBMLC") and Salem Communications Corp.) (hereinafter "Radio Broadcasters") said that "RIAA should be required, in the first instance, to demonstrate why each element of data it seeks is necessary for the collection and distribution of statutory royalties . . . ." Radio Broadcasters' Comments at 2.<sup>6</sup>

RIAA does not agree that copyright owners are responsible for justifying why each requested data element in a notice of use must be provided by a service operating under a statutory license. As the statutory licenses make clear, services must provide copyright owners with "reasonable notice of use of their sound recordings." See 17 U.S.C. §§ 112(e)(4), 114(f)(4)(A). For the word "reasonable" to have any meaning, it must include the reporting of sufficient data to permit an agent to distinguish with a high degree of confidence copyright ownership for the hundreds of thousands of sound recordings performed by the services so that, as required by statute, performance royalties may be allocated among copyright owners, featured performers and nonfeatured musicians and vocalists. See 17 U.S.C. § 114(g)(2)(A)-(C). It is the duty of the

<sup>&</sup>lt;sup>5</sup> Most commenting parties have stated that the "RIAA" should be forced to justify why certain data elements should be required under the notice and recordkeeping regulations. It would be more appropriate to ask why copyright owners or their agents need certain data for collecting and distributing royalties or enforcing the requirements of the statutory license, particularly where there are at least two "Designated Agents" that have been recognized by the Copyright Arbitration Royalty Panel ("CARP") in the Matter of Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1 & 2 ("Webcaster CARP") to receive and distribute royalties on behalf of copyright owners and performers.

<sup>&</sup>lt;sup>6</sup> References to the filings of a service or individual that submitted comments in response to the NPRM will be referenced as follows: "Service or Individual Name (or Abbreviation)" [space] "Comments at \_\_."

Copyright Office to adopt regulations meeting this standard. To assist the Copyright Office, copyright owners and users need to explain how the information they propose to have included in the reports of use will ensure the proper allocation of royalties among the entitled parties and permit copyright owners to test for a service's compliance with the statutory requirements. Copyright owners and performers, through SoundExchange, are already providing statutory services with a substantial benefit, by paying for the distribution of statutory royalties to each individual copyright owner and performer. Copyright owners have also justified with specificity why specific data elements are necessary on a report of use. To the extent that any service proposes to report minimal data (e.g., artist and song title and, where available, album title) or something less than what is proposed in the NPRM without explaining how such data will be sufficient for allocating royalties among copyright owners and performers or enforcing the statutory requirements, such service has failed to justify how such reporting is "reasonable."

A. RIAA Has Justified With Specificity Why Its Proposed Reporting Requirements Are Necessary For Royalty Collection, Distribution And Enforcement Of Statutory Requirements.

RIAA justified in its initial comments of April 5, 2002 the reasoning behind each data element in RIAA's proposed reports of use, which reports are substantially similar to the regulations proposed by the Copyright Office in the NPRM. See RIAA Comments at 8-11, 15-16. In addition, and contrary to the expectations of Radio Broadcasters (see Radio Broadcasters' Comments at 17), RIAA explained with great specificity how the

<sup>&</sup>lt;sup>7</sup> Cf. Music Choice Comments at 2 ("[T]he proponent of any recordkeeping requirements should initially meet a high burden to show that the requested data is necessary to effect compensation to copyright holders and not redundant in light of other data already being collected."). What Music Choice fails to acknowledge is that a similarly "high burden" must be placed upon any service that proposes alternative reporting requirements to demonstrate how those reporting requirements will provide copyright owners with reasonable notice of use of their sound recordings.

requested data elements were needed for (1) identifying the service and the type of programming offered by the service; (2) identifying the date, time and number of transmissions; and (3) identifying the specific sound recordings publicly performed by the services. See RIAA Comments at 46-62.

RIAA reiterates that its request for comprehensive data in reports of use is not, as many services hypothesized, an effort to obtain "valuable" or "confidential" marketing data from the services. See e.g., Digital Media Association ("DiMA") Comments at 11; Radio Broadcasters' Comments at 64; Joint Comments of Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio, Inc. ("XM") (hereinafter "SDARS") Comments at 44-45. Rather, RIAA's data requests are intended to accomplish three objectives: (1) permit copyright owners or their agents to collect the proper amount of statutory royalties; (2) permit collecting entities to distribute accurately statutory royalties to those copyright owners and performers entitled to receive such royalties; and (3) permit copyright owners to enforce the requirements of the statutory license. Many of the services that filed comments in this rulemaking have proposed reporting data that would not permit copyright owners to fulfill these identified objectives.

1. The Sound Recording Data Requested By RIAA Is Necessary For Ensuring The Proper Payment Of Royalties By Statutory Services.

RIAA's proposed regulations are designed to permit copyright owners or their agents to ensure that statutory services pay the royalties that they are required to pay. See RIAA Comments at 9-10. This requires services to identify themselves for each line item of data that they report. See RIAA Comments at 47. Because different royalty rates apply to different types of statutory transmissions and even within the same category of

statutory transmissions, services must also report each type of transmission that they are making so that copyright owners can ensure that the proper royalty is paid for the specific types of transmissions made by a service. See RIAA Comments at 48-49. For example, Sirius offers both preexisting satellite digital audio radio service transmissions (60 channels of commercial-free music and 40 channels of news, sports and entertainment programming) and 60 channels of eligible nonsubscription transmissions. SDARS Comments at 3-4. While the Copyright Office has not established a rate for Sirius' preexisting satellite digital audio radio service transmissions, a rate has been established for eligible nonsubscription transmissions and so Sirius will have to pay for its 60 webcast channels at that rate.

Numerous broadcasters also offer different types of eligible nonsubscription transmission services, which may be subject to different rates depending upon whether the programming is a simultaneous Internet retransmission of an over-the-air AM or FM radio broadcast, Internet-only programming, or programming offered by a Non-CPB, Non-Commercial Broadcaster. See e.g., Comments of the Adventist Radio Broadcasters

<sup>&</sup>lt;sup>8</sup> See Report of the Copyright Arbitration Royalty Panel In the Matter of Rate Setting For Digital Performance Right In Sound Recordings And Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1 & 2 (Feb. 20, 2002) ("Webcaster CARP Report"), Appendix A. The Webcaster CARP adopted different per performance rates for simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts (for "Webcasters" and "Commercial Broadcasters"), all other internet transmissions (for "Webcasters" and "Commercial Broadcasters"), and three different per performance rates for "Non-CPB, Non-Commercial Broadcasters."

Association ("ARBA"); 9 Radio Broadcasters' Comments, Exhibit I, Statement of Jim Tinker; 10 Exhibit K, Statement of Dusty Rhodes. 11

As some services will have to calculate their royalty liability on a per performance basis, it is also essential for services to report the total number of performances that they have transmitted under the statutory license. Furthermore, the Webcaster CARP defined a "performance" as "each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one listener)." Webcaster CARP Report, Appendix B, Rates and Terms for Eligible Nonsubscription Transmissions and the Making of Ephemeral Reproductions at § 1(1) (hereinafter "Webcaster CARP Report, Appendix B"). Consequently, services must track each transmission to each listener in order to qualify for the statutory license for eligible

<sup>&</sup>lt;sup>9</sup> ARBA's comments note that "[m]any ARBA members operate internet websites, some of which include the streaming of audio. In most cases, the audio streamed is the simultaneous transmission on the internet of the station's over-the-air broadcast signal. At least one member also produces and transmits an audio stream that is separate and apart from its over-the-air broadcast signal." ARBA Comments at 1-2.

<sup>&</sup>lt;sup>10</sup>According to Mr. Tinker, KKLA Communications Group offers both simulcast programming and Internet-only programming: "Today, all but one of our LA radio stations simulcast their broadcast over the Internet, and I oversee those streaming activities. In addition, I helped launch and continue to work with Christian Pirate Radio (CPR), an Internet-only service that operates seven separate channels of streamed content under the umbrella of <a href="www.ChristianPirateRadio.com">www.ChristianPirateRadio.com</a> and <a href="www.myCPR.com">www.myCPR.com</a>." Radio Broadcasters' Comments, Exhibit I, Statement of Jim Tinker, ¶ 2.

<sup>&</sup>lt;sup>11</sup> The WAY-FM Media Group offers both simulcast programming and Internet-only programming: "To further our ministry, we stream the signals of our Nashville and West Palm Beach WAY-FM stations over the Internet through our website, <a href="www.wayfm.com">www.wayfm.com</a>. We also have an Internet-only ministry, The X Station, located at <a href="www.thexstation.com">www.thexstation.com</a>. The X Station is an edgier, male-oriented Christian modern rock 'station." <a href="https://dx.ncbi.nlm.ncbi.n

<sup>&</sup>lt;sup>12</sup> The Copyright Office should reject proposals to permit services to estimate prospectively the number of performances during an accounting period, particularly where a statutory royalty obligation is tied to actual and not estimated performances. <u>See</u>, e.g., Radio Broadcasters' Comments at 5 ("Broadcasters . . . should be allowed to report aggregate listener data, not detailed records of every single listener session."). Permitting estimated performances prospectively (more than 30 days) would also be contrary to the recommendations of the Webcaster CARP. <u>See</u> Webcaster CARP Report at 109-10 (Interim Public Version).

nonsubscription transmission services.<sup>13</sup> Consistent with the recommendation of the Webcaster CARP and for the reasons stated in its initial comments (including the need for performance data for royalty distribution), RIAA's proposed regulations require services to report the total number of transmissions of each sound recording. <u>See</u> RIAA Comments at 9-10, Exhibit A at Sec. 201.36(e)(1)(viii).

Because different services may be liable for different royalty payments under the various rate structures that may be adopted by the Librarian of Congress (the "Librarian"), the Copyright Office must require services to identify on a report of use the Name of Statutory Service, the types of transmissions made by the service (i.e., the "Transmission Category"), the Channel or Program Name of transmission, and the Total Number of Performances of each sound recording. This information is within the service's possession and it cannot be deemed burdensome to include in a report of use. If copyright owners or their agents are denied this information, they will have no method for confirming the royalty calculations of the services.

2. The Sound Recording Data Proposed By RIAA Is Necessary For Ensuring The Proper Distribution Of Statutory Royalties To Copyright Owners And Performers.

As explained in its initial comments, RIAA proposed requiring services to report detailed information on the usage of specific sound recordings in order to distribute

<sup>&</sup>lt;sup>13</sup> To the extent that services make transmissions using multicasting technologies rather than unicast technologies, <u>see</u> Philip Gladstone ("Gladstone") Comments at 2-3, such transmissions should only qualify for the statutory license if the service can maintain a control connection that permits the service to track each transmission so that the required statutory royalty is paid. RIAA believes that entities facilitating multicasting do and will have the capability to track the number of transmissions of all or any portion of a sound recording to a listener. Exhibit A attached hereto contains information on products readily available for the tracking of transmissions in a multicast environment; <u>see also</u> Exhibit M, Reliacast "Precise Audience Measurement of Audio & Video Streaming" Fact Sheet at 2 ("Reliacast's Audience Manager system is an easy-to-use, web-based application that can be seamlessly integrated into any organization employing unicast or multicast content delivery."). However, to the extent that a service uses a vendor or Footnote continued on following page.

royalties to the copyright owners of and the performers on such sound recordings. See RIAA Comments at 10-11. A service operating under the Section 114 statutory license is permitted to transmit to the public any sound recording that has "been distributed to the public under the authority of the copyright owner." 17 U.S.C. § 114(d)(2)(C)(vii). Consequently, an enormous number of distinct sound recordings potentially may be reported on a notice of use.

RIAA noted in its initial comments the depth and breadth of programming offered by webcasters. See RIAA Comments at 13-15. Many of the services submitting comments in this rulemaking also identified the depth and breadth of programming that they offer:

- "XM, for example, maintains a database of information for 1.6 million sound recordings." SDARS Comments at 11.
- "Clear Channel's centralized song database has information about approximately 43,000 titles although perhaps up to 20% of these entries may be duplicates." Radio Broadcasters' Comments, Exhibit B, Statement of Brian Parsons, ¶ 12.
- "Mayflower's station is multi-formatted and the number of recordings played on the air is larger compared to those of tightly formatted commercial stations. The libraries accumulated over many years includes [sic] thousands of compact discs and albums that continue to receive airplay..." Mayflower Hill Broadcasting Corporation ("Mayflower") Comments at 2.
- "The libraries accumulated over many years includes [sic] tens of thousands of compact discs and albums that continue to receive airplay . . ." Collegiate Broadcasters, Inc. ("CBI") Comments at 2.
- "[T]hese stations are playing thousands of different songs from many different genres . . . ." National Federation of Community Broadcasters, Inc. ("NFCB") Comments at 3.

technology for multicasting and such vendor or technology is not capable of tracking the total number of performances, then such service should not be eligible for the statutory license.

- College Broadcaster KDVS' music library "consists of more than 150,000 compact discs and phonorecords . . . ." College and University Radio Broadcasters ("College Broadcasters") Comments at 18 n.17.
- "[Harvard Radio Broadcasting Co., Inc.] estimates it plays 70,000-90,000 unique sound recordings annually." Harvard Radio Broadcasting Company ("Harvard") Comments at 8.

Where the breadth of sound recordings programmed by services operating under the Section 114 statutory license is limited only by the imagination of a programming director, the parameters of scheduling software or computer algorithms, and by the service's library of sound recordings, there is a tremendous burden on collecting entities to identify the copyright owners and featured performers entitled to payment for each and every sound recording performed.<sup>14</sup> The only way to ensure the distribution of statutory royalties in accordance with Congress' mandate to allocate royalties among copyright owners, featured performers and nonfeatured performers is to require services to identify with specificity each sound recording performed so that such sound recording can be distinguished from every other sound recording that has ever been publicly released. Contrary to the beliefs of many of the commenting parties, who naively assume that royalty distribution is a simple process that can be accomplished with hardly any data, the identification of copyright owners and performers, who are entitled to receive royalties a responsibility that, absent compulsory licensing and the formation of SoundExchange would belong to the services – is difficult, time consuming and expensive. This is because sound recordings cannot be identified definitively on the basis of only a few data

<sup>&</sup>lt;sup>14</sup> The burden on the independent administrators for nonfeatured musicians and vocalists is even greater. See, e.g., American Federation of Musicians of the United States and Canada ("<u>AFM</u>") and the American Federation of Television and Radio Artists ("<u>AFTRA</u>") (collectively "<u>Unions</u>") Comments at 16-20.

points and, as noted by Royalty Logic, Inc. ("<u>RLI</u>"), "there is currently no standard publicly available and widely used electronic identification system (e.g., common numbering system, electronic watermark, digital fingerprint, etc.) and no commonly available reference database for additional identification, copyright ownership and other relevant business information." RLI Comments at 3.

Collecting entities have no way of identifying the sound recordings performed by a service unless the service provides that information. Selection and performance of the sound recording is solely within the control of the service. See Exhibit B, Tab 2, Declaration of Gretchen Anderson, ¶ 10; Tab 3, Declaration of Suzanne Berg, ¶ 9; Tab 4, Declaration of John Dalton, ¶ 9; Tab 6, Declaration of Bruce Iglauer, ¶ 7; Tab 7. Declaration of Gerry Kuster, ¶ 9; Tab 8, Declaration of Heather McBee, ¶ 10; Tab 9, Declaration of Marina Scarlata, ¶ 10; Tab 10, Declaration of Rick Wietsma, ¶ 9; Tab 11, Declaration of Bill Macky, ¶ 9; Tab 12, Declaration of Leslie Jose Zigel, ¶ 9. Although one could theoretically monitor the performances on certain publicly available channels (e.g., monitor each and every terrestrial broadcast transmission that is simulcast on the Internet) if one had unlimited resources, there are hundreds of thousands of "channels" of programming that are available only to the recipient of that transmission and, therefore, are incapable of being monitored. See RIAA Comments at 7. But requiring collecting entities to engage in such monitoring improperly shifts the burden of reporting from the services – which voluntarily elect to engage in digital audio transmissions – to the copyright owners and performers, who are already providing a service to entities by saving them the time and expense of having to pay individual copyright owners and performers directly. Furthermore, the statutory mandate is for services to provide

copyright owners with reasonable notice of use of sound recordings, not for copyright owners to have to search or monitor for information on usage.

To satisfy the statutory mandate, the Copyright Office must adopt reporting requirements that permit collecting entities to identify the individual copyright owners and performers for each sound recording performed by a service. Only through such identification will those entitled to statutory royalties actually receive their share of the statutory royalties. The regulations proposed by the RIAA require the services to provide the information necessary to properly distribute statutory royalties. See RIAA Comments at 55-61.

3. The Copyright Office Has Already Properly Ruled That Reports Of Use Must Contain Information To Allow Verification That Statutory License Conditions Are Being Met.

Radio Broadcasters and XM/Sirius, in virtually the same words, reassert an argument made and rejected by the Copyright Office in the Notice and Recordkeeping for Digital Subscription Transmissions, Interim Regulations, 63 Fed. Reg. 34, 289 (June 24, 1998) (the "Original Determination"): that reports of use submitted by a service should not be used to determine that service's compliance with the statutory license conditions, principally the sound recording performance complement. See Radio Broadcasters' Comments at 17-21; SDARS Comments at 21-24. As the Original Determination reflects, it makes little sense to rule that "reports of use" of sound recordings under a statutory license should not provide information that confirms that such use meets one of the most important requirements of that statutory license. This is especially true where information as to compliance is solely within the possession of the service. See RIAA Comments at 7 and n.2 (describing services that create channels "on the fly" for each listener that cannot be evaluated through mere observation of the service).

The Copyright Office's reasoning on this issue in 1998 was sound and applies with equal force to the services in this proceeding:

The Office considered arguments of DCR and other Services that the Act imposes no obligation to affirmatively report compliance with the complement, but reaffirms its earlier judgment. The Office notes that conforming to the performance complement is a condition of the statutory license, and a Service that complies with the regulatory notice requirements and pays the statutory royalties thereby avoids infringing the copyright owners' exclusive rights. 17 U.S.C. 114(d)(2), (f)(5). The Office determines, therefore, that it is within its rulemaking authority under section 114(f)(2) to require reporting of complement information. See Cablevision Sys. Dev. v. Motion Picture Ass'n, 836 F.2d 599 (D.C. Cir. 1988) (Copyright Office had authority to issue regulations interpreting statute). The Office believes that the presence and specificity of the performance complement indicates Congress' intent that records of use include data to test compliance. While section 114(j)(7) provides that transmissions from multiple phonorecords exceeding the performance complement's numerical limitations will nonetheless conform to the complement if the programming of multiple phonorecords was not "willfully intended" to avoid the numerical limitations, a pattern of regular conduct might provide evidence of the requisite intent.

Original Determination at 34,294.

Radio Broadcasters and XM and Sirius spend little effort addressing or attempting to distinguish this conclusion. Rather, they provide a tortured interpretation of the "Authority for Negotiations" provision in Section 114(e)(1) and its legislative history to support their request to provide less than complete information about their use of sound recordings. This argument fails for several reasons. First, as the legislative history cited by the services makes clear, Section 114(e)(1) must be interpreted "to effectuate Congress's intent to enable the statutory goals to be met." H.R. Rep. 104-274 at 22. A primary goal of the DPRA "is to ensure that performing artists, record companies and others whose livelihood depends upon *effective* copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative

works are used." <u>Id.</u> at 10 (emphasis added). That goal will be furthered if accurate and complete information as to compliance with the requirements of the statutory license is provided by the services.

The Radio Broadcasters also claim that the statute requires reports of use to each individual copyright owner of only those sound recordings owned by that copyright owner, so that where those recordings are intermingled with recordings owned by other record companies, they necessarily would be incomplete for purposes of determining compliance with the performance complement. They argue that this "rule" should be followed even if the service files a single report with a single collective that represents all of the relevant copyright owners and recordings that service used. See Radio Broadcasters' Comments at 18-20. Of course, the Radio Broadcasters and XM and Sirius are not proposing that they actually provide separate reports to each individual copyright owner – they stand to benefit greatly from a single (or small number of) copyright owner collective organization(s). The efficiencies of having collectives handle collection and distribution should run both ways, and far outweigh the hyper-technical <sup>15</sup> and hypothetical statutory interpretation offered in the Radio Broadcasters' comments. <sup>16</sup>

<sup>&</sup>lt;sup>15</sup> That statutory interpretation relies on a single word – "their" – in Section 114(f)(4)(A). What the argument overlooks is that the subparagraph is phrased in terms of "copyright owners" plural – not a single copyright owner – meaning that Congress intended reports to be provided with information from multiple copyright owners rather than individual ones.

<sup>&</sup>lt;sup>16</sup>The initial comments raise the question of how to address reporting in the case of non-compensable performances. These would seem to fall into three categories: (1) performances of pre-1972 sound recordings; (2) performances directly licensed from the copyright owner; and (3) "incidental" performances under the decision of the Webcaster CARP. RIAA believes that the first two types of performances should be reported, because it is necessary to know about them to determine compliance with the sound recording performance complement in the case of compensable performances. For example, transmission of a whole album of greatest hits by one recording artist would violate the complement in the case of tracks where a service otherwise might rely upon the statutory license, even if a service had direct licenses for some tracks or some of the tracks were pre-1972 recordings. It might, therefore, be appropriate to include a field in the Footnote continued on following page.

# 4. The Data Requested By RIAA Is Necessary For Ensuring Compliance With The Statutory Requirements.

As explained in its initial comments, RIAA's proposed reporting regulations would permit copyright owners or their agents to enforce the requirements of the statutory license, including the limitations contained in the sound recording performance complement. See RIAA Comments at 15-16. And for the reasons set forth in Section II.A.3 supra, RIAA believes that it is appropriate and necessary for the Copyright Office to adopt reporting regulations that permit copyright owners to enforce the requirements of the statutory license, or those requirements would have no meaning. RIAA's proposed regulations would provide copyright owners with the minimum amount of information needed for compliance monitoring.

The specific categories of information that are needed for ensuring compliance with the statutory requirements are: (1) the Channel or Program Name; (2) the Start Date and Time of the Sound Recording's Transmission; (3) the Type of Program; and (4) identifying information for each sound recording. Copyright owners need the Channel or Program Name because the sound recording performance complement is enforced for each "particular channel" of programming offered by a service. See 17 U.S.C. § 114(j)(13). If all sound recordings were reported without regard to their transmission on a particular channel, including channels created on the fly for individual users, the sound recording performance complement could not be enforced unless copyright owners monitored each channel, which is impossible given the nature of certain transmissions.

reports of use for services to identify direct licensed or pre-1972 selections. The RIAA would not require that incidential performances, that qualify for compulsory licenses, to be reported.

To ensure compliance with the 3-hour limitation in the sound recording performance complement, copyright owners also need to receive detailed information on the start date and time for transmissions of sound recordings on each channel of programming. See 17 U.S.C. § 114(j)(13). Without date and time information, it would be impossible to determine whether, for example, more than four sound recordings by the same featured artist were performed on a particular channel during any 3-hour period. Of course, detailed information on each sound recording performed must be reported so that a copyright owner can determine whether more than 3 different selections of sound recordings from any one phonorecord or 4 different selections by the same featured recording artist have been performed. See 17 U.S.C. § 114(j)(13).

To ensure compliance with the limitations on archived, continuous and prescheduled programming, copyright owners need to receive reports of use identifying the Type of Program contained on a particular channel. <u>See</u> 17 U.S.C. § 114(d)(2)(C)(iii)(I)-(IV) and RIAA Comments at 50.

If services are permitted to omit from reports of use data that is necessary for ensuring compliance with the statutory requirements, then the statutory requirements will be meaningless. This could not have been what Congress intended when it adopted restrictions on the public performance of sound recordings via digital audio transmissions, particularly where the *quid pro quo* of the license is compliance with various statutory requirements. And where compliance with statutory requirements

cannot be reasonably determined absent self-reporting, then it is proper to place the burden of reporting compliance upon the services themselves.<sup>17</sup>

B. Royalty Logic, Inc., A Designated Agent That Has A Long
And Close Relationship With Broadcasters And Other
Copyright Users, Also Proposed Requiring Services To
Provide Detailed Reports Of Use For Royalty Collection And
Distribution.

RIAA was not alone in requesting detailed reports of use from services for royalty collection and distribution. Even RLI, an entity designated by the Webcaster CARP to receive and distribute royalties pursuant to the Section 112 and Section 114 statutory license and whose President and Chief Executive Officer testified on behalf of webcasters and broadcasters in the Webcaster CARP, <sup>18</sup> proposed in its initial comments that services provide data on artist, song title, retail album title, recording label, catalog number, International Standard Recording Code ("ISRC"), the Universal Product Code ("UPC") and the copyright owner information provided in the copyright notice of the retail

<sup>&</sup>lt;sup>17</sup> SoundExchange members are troubled by the lack of compliance with existing requirements of the statutory license, including the obligation to file an Initial Notice of Digital Transmission of Sound Recordings Under Statutory License. Several of the services that filed comments in this rulemaking appear not to have filed an Initial Notice with the Copyright Office (e.g., CPI Interactive's VirtualRadio.com; Talley Broadcasting Corporation's WSMI-FM, -AM; Mayflower Hill Broadcasting Corporation; Beethoven.com; WOBC 91.5 FM; 3WK). Compliance with other requirements of the statutory license cannot be determined by the provision of information at issue in this proceeding. Enforcement of these conditions, including the requirement to display artist name, album title and song title, see 17 U.S.C. § 114(d)(2)(C)(ix), requires copyright owners to expend time and money that would otherwise be available for distribution. Where copyright owners seek to enforce the requirements of the statutory license, all statutory licensees benefit because it prevents some services from obtaining an unfair advantage by not playing by the rules. For example, some of the parties filing comments in this rulemaking are not presently complying with the display requirements (e.g., Inetprogramming Incorporated; Andante Corp.; Ultimate-80s; Beethoven.com; Killer Oldies; Sirius Radio (webcasts)). Services that undertake the expense to comply with the display requirements may be at a competitive disadvantage vis-à-vis the services that do not incur those expenses.

<sup>&</sup>lt;sup>18</sup> When Mr. Gertz testified in the Webcaster CARP he also identified himself as an owner and executive of Music Reports, Inc., a sister corporation of RLI. MRI's clients are nearly 100% copyright users rather than copyright owners. <u>See</u> Webcaster CARP Tr. at 10,993.

album.<sup>19</sup> Although RLI did not explain its reasoning for supporting each of the specific data elements it proposed in its comments, it set forth a general rationale for why more data should be reported by the services: "Generally, the more data provided by the transmitting service (even though redundant and possibly inaccurate) the better – as the collectives could use additional data fields (absent a match on title, album and artist) to help in the identification process." RLI Comments at 5 n.5. This sentiment expressed by RLI is consistent with the reasoning set forth in RIAA's Comments. See RIAA

Comments at 39 ("[R]eceiving more data from a service – even if in some cases some of the data is incomplete – permits a collecting entity to conduct a more comprehensive search for copyright owner and performer information (e.g., the additional data provides more pieces to the puzzle).").

C. The Process By Which The Copyright Office Has Considered RIAA's Proposed Reporting Requirements Has Been Fair To Services And Wholly Consistent With Applicable Principles Of Administrative Law

The Radio Broadcasters' comments attempt to raise the specter of legal infirmity in the Copyright Office's Notice of Proposed Rulemaking by arguing that the Copyright Office has established an unfair process and has failed to conform to the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-612. These assertions are meritless and appear to have been proffered simply to provide an opportunity to hurl insults and false accusations at RIAA. See Radio Broadcasters Comments at 16-17.

RIAA filed its petition in this proceeding nearly a year ago. At the time it did so, it provided courtesy copies to counsel for many of the most outspoken critics of the

<sup>&</sup>lt;sup>19</sup> RLI divided its data requests into a "core data set" that should be reported and a permissive data set that "should be required to be provided by the services where 'applicable' and/or where 'available and feasible." RLI Comments at 4-5.

regulations proposed in the Notice of Proposed Rulemaking. Since the Copyright Office issued the Notice of Proposed Rulemaking, RIAA has provided the Office with 67 pages of detailed explanation of its proposed recordkeeping requirements. In its initial comments, RIAA modified its proposal to reflect concerns that had been raised, and RIAA does so again in these reply comments. The Copyright Office has indicated that it will hold a roundtable discussion among affected parties to further address outstanding issues and attempt to reach consensus. It would be hard to imagine a process more fair. <sup>20</sup> The process followed by the Copyright Office in this proceeding certainly comports with the minimum requirements of administrative law.

Turning to the specific legal arguments raised by the Radio Broadcasters, the Copyright Office has properly not placed any burden on any party to this proceeding. To be sure, the regulations proposed in the Notice of Proposed Rulemaking are similar to those originally proposed by RIAA (which are similar to the interim regulations adopted by the Copyright Office for preexisting subscription services). That is presumably because, in the nearly three years that notice and recordkeeping for eligible nonsubscription services has been pending, 21 RIAA was the only party to propose specific regulations to the Copyright Office. Even during the nine months between the filing of RIAA's petition and publication of the Notice of Proposed Rulemaking, the

<sup>&</sup>lt;sup>20</sup> The reality of this rulemaking directly contradicts the claims of the Radio Broadcasters and their unfounded accusation that "there is little reason to suppose that RIAA will provide much evidence in support of its proposal in its initial comments. RIAA can be expected to take advantage of the opportunity to 'sandbag' the services by saving its arguments and evidence for the reply comments." Radio Broadcasters' Comments at 17. Contrary to these expectations, RIAA identified with specificity in its initial comments the need for and justifications of the data elements it requested.

<sup>&</sup>lt;sup>21</sup> The Copyright Office first mentioned recordkeeping for eligible nonsubscription services on August 4, 1999, where it deferred consideration of those regulations in light of ongoing industry negotiations. <u>See</u> 64 Fed. Reg. 42316, 42317 (Aug. 4, 1999).

services did not provide the Copyright Office with any alternative regulations for consideration before the Notice was issued. After sitting on the sidelines for nearly a year, the services cannot suddenly complain when the Copyright Office properly submitted for public comment the only proposal pending before it. Certainly they should not be heard to propose further pointless procedural hurdles that will only delay adoption of regulations and compound what has already been nearly four years of delay in distributing royalties to artists and copyright owners.

In arguing that a burden of proof has unfairly been placed on them, the Radio Broadcasters suggest that the Copyright Office should defy administrative law and place a burden of proof on RIAA. As the very case cited by the Radio Broadcasters makes clear, in a notice and comment rulemaking such as this proceeding, there is no requirement that the proponent "assume and satisfy a 'burden of proof." Am. Trucking Ass'n v. United States, 344 U.S. 298, 320 (1953). Indeed, even in CRT rate-setting proceedings courts have ruled that no burden of proof exists on either party under the Administrative Procedure Act. See NCTA v. CRT, 724 F.2d 176, 186 n.15 (D.C. Cir. 1983) & Amusement and Music Operators Ass'n v. CRT, 676 F.2d 1144, 1154 (7th Cir. 1982). This is not litigation. There is no burden of proof to be satisfied by any of the interested parties. The Copyright Office should reject the Radio Broadcasters' suggestion to ignore this basic principle, as it need only "give interested persons an opportunity to participate in the rule making" and then, "[a]fter consideration of the relevant matter presented, ... incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c).



Finally, the Radio Broadcasters argue that the Copyright Office has violated the RFA in its Notice because it failed to assess the impact of the proposed regulations on small business entities. This argument ignores the Copyright Office's consistent conclusion that "the Copyright Office, located in the Library of Congress which is part of the legislative branch, is not an 'agency' subject to the Regulatory Flexibility Act ...."

See, e.g., 64 Fed. Reg. 42316, 42317 (Aug. 4, 1999). In any event, the Copyright Office has received numerous comments from smaller entities and invited them to a roundtable discussion to raise concerns about the impact regulations might have on their operations. See 67 Fed. Reg. 18148, (April 15, 2002) ("The Office is especially interested in the views of small businesses engaged in webcasting as well as individuals and small businesses who are copyright owners of sound recordings, and in details relating to the benefits, costs and burdens associated with the published notice and recordkeeping proposal and of alternatives to that proposal."). This approach is fully consistent with the policies behind the RFA.

#### III. RIAA'S PROPOSED REPORTING REQUIREMENTS ARE NOT UNDULY BURDENSOME

Many of the services filing comments in this rulemaking have complained that the information under consideration for inclusion in a report of use is unavailable to them and should, therefore, not be required by the Copyright Office. Anticipating these complaints, RIAA provided exhibits in its initial comments identifying where the requested data elements could be found on promotional product, commercially released

<sup>&</sup>lt;sup>22</sup> The RFA imposes obligations only on an "agency," <u>see</u> 5 U.S.C. § 603(a), which is defined "as each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include ... the Congress ...." 5 U.S.C. §§ 551(1)(A) & 601(1).

product and in promotional catalogues. <u>See</u> RIAA Comments Exhibits F-H. In this section, RIAA responds to the specific claims made by many of the services about the unavailability of identifying information for sound recordings.

#### A. Identifying Information Necessary For Royalty Distribution Is Generally Available On Promotional Product.

In reading the comments of many of the services in this rulemaking one would think that the promotional sound recordings that appear in the hands of program directors come in mysterious containers with little identifying information and, therefore, only minimal information should be required on a report of use. Some services allege that promotional releases may identify only the featured artist and the title of the sound recording, but very little else. Here are just a few of the statements made by various services in this rulemaking:

- "None of [the sound recordings given to radio stations] come with all or even most of the information RIAA would have radio stations report for each song they schedule." Radio Broadcasters' Comments at 26.
- "[S]ometimes all we get from the label is the artist name and title of the song..." <u>Id.</u>, Exhibit A, Statement of Jaime Kartak, ¶ 5.
- "The compilation discs have even less of the requested information generally only title, artist, and track length." <u>Id.</u>, Exhibit C, Statement of Michael Cary, ¶ 7.<sup>23</sup>
- o "The only information we can count on being sent to us with a CD provided by the label is the title and artist sometimes, the labels don't even provide the album name or a copyright notice indicating the date and owner of the sound recording copyright, much less UPC, ISRC, or catalog number." Id., Exhibit K, Statement of Dusty Rhodes, ¶ 9.
- "The promotional singles that the record labels provide contain varying amounts of information, often as little as the title of the sound recording and artist." SDARS Comments at 11.

<sup>&</sup>lt;sup>23</sup> <u>Cf.</u> Exhibit B, Tab 13, Declaration of David Graupner, ¶ 5; <u>see also</u> Exhibit B, Tab 8, Declaration of Heather McBee, Attachments of CDX compilation materials and identifying information.

"[M]uch of the music that the Preexisting Satellite Services broadcast is provided to them by the record labels in order to obtain free airplay, and the labels themselves do not provide many of the data elements that their collective now seeks." <u>Id</u>. Comments at 36.

Such allegations are generally false, misleading and contradicted, not only by the information provided in RIAA's comments, but also by other services filing comments in this proceeding. These allegations are also contradicted by the declarations from several label executives describing their respective company's practices with regard to the distribution of promotional product. See Exhibit B hereto.

1. The Statements Of Many Commenting Parties In This Rulemaking Acknowledge That Promotional Product Contains Identifying Information.

Numerous parties acknowledge in their initial comments the receipt of promotional sound recordings from labels. This is to be expected as record labels frequently provide releases to terrestrial broadcasters (both commercial and non-commercial), and in varying degrees to preexisting subscription services, preexisting satellite digital audio radio services and eligible nonsubscription transmission services. But these commenting parties themselves acknowledge the availability on promotional product of nearly 70% of the identifying data elements that RIAA requested in its proposed uniform report of performance. RIAA proposed in its initial comments that the Copyright Office adopt regulations requiring services to report Artist Name, Sound Recording Title, ISRC, Track Label (P)-Line, Duration of the Sound Recording, Album Title, Marketing Label, Catalog Number, UPC and Release Year. See RIAA Comments at 55-61 and Exhibit C (columns ix)-(xviii)). The following quotes<sup>24</sup> indicate that

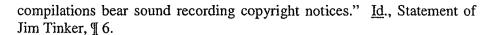
<sup>&</sup>lt;sup>24</sup> The following quotes are from unsworn statements that are based to a large extent on hearsay. It is unclear from the statements what the person has personal knowledge of.

promotional product usually includes all of RIAA's requested data except Catalog

#### Number, ISRC and UPC:

- "The only information we readily receive about the songs we play is whatever is available via the liner or package notes or on the CD itself. That usually includes title, artist, record company, and sometimes album name and copyright information about both the musical work and the sound recording." Radio Broadcasters' Comments, Exhibit A, Statement of Jaime Kartak, ¶ 5.
- "Many of the promo singles we received are slickly packaged, with photos of the performer, color CD sleeve inserts, and basic identifying information about the name of the song, the length of the track, the name of the label, and often the copyright owner and date." <u>Id.</u>, Exhibit E, Statement of Amy Van Hook, ¶ 11.
- "The Nikka Costa 'Everybody Got Their Something Sampler,' attached as Exhibit 3 to this Statement, is a typical example of such a compilation. The sampler appears to contain seven tracks from the artist's forthcoming album, 'Everybody Got Their Something.' The packaging of the sampler lists the title of several songs, the name of the artist being promoted, and the title of her forthcoming album. In small type, it also lists the copyright owner and year. The listed catalog number does not appear to coincide with the catalog number of the retail album, and there is no indication whatsoever of any UPC or ISRC..." Id., ¶ 13.25
- "For the music that comes from major labels, we generally get the title, artist, record label name, and length of the track. The promo CDs also generally have the composer information, the names of the sound recording copyright owner and label, and the release year." Radio Broadcasters' Comments, Exhibit G, Statement of Mary Guthrie, ¶ 5.
- Promotional compilations "list the name of the artist, the name of the songs, and often the name of the distributing label. . . . Many of these

<sup>&</sup>lt;sup>25</sup> RIAA has attached as Exhibit C hereto a copy of the Nikka Costa sampler CD cited by Ms. Van Hook. RIAA is unsure how Ms. Van Hook determined that the catalog number on the sampler does not coincide with the catalog number of the retail version of the album unless Entercom Communications Corp. was also provided with a copy of the full retail album. Nevertheless, as Ms. Van Hook's admission indicates, the Nikka Costa sampler contains 90% of the information requested by RIAA: Artist Name, Sound Recording Title(s), Track Label (P)-Line, Duration of the Sound Recording(s), Album Title, Marketing Label, a distinct Catalog Number and Release Year. The only visible information missing on the sampler is the UPC number. The ISRC number, however, was capable of being read with the software product offered by Exact Audio Copy EAC. Exhibit C-3 indicates the ISRC numbers for the first six sound recordings on the Nikka Costa "Everybody Got Their Something" Sampler.



Promotional releases "of course list the title of the song and the name of the artist. They frequently mention the name of the album the song is going to appear on, but not always – sometimes, the album title is not yet determined when the single is released to us. They also sometimes list composer information, the length of the track, the name of the label, and the year and copyright owner information contained in the copyright notice, or 'P line." Id., Exhibit J, Statement of Dan Halyburton, ¶ 8.

While the above statements acknowledge the general availability of identifying information on promotional product, they do not always tell the full story. For example, Ms. Van Hook, one of the individuals providing a statement with the filing of the Radio Broadcasters, states that "promotional singles [like Aerosmith's 'Fly Away from Here' single] are often sent to the radio stations in anticipation of a new album before the retail version is released, so retail information such as UPC code, catalog number, and sometimes even the album title, is not available to anyone. If the ISRC codes are on these promos, we cannot access them." Id., Exhibit E, Statement of Amy Van Hook, ¶ 11. Attached hereto as Exhibit D are images of the Aerosmith "Fly Away From Here" promotional CD and the accompanying label packaging for that promotional CD. Contrary to Ms. Van Hook's statements, the forthcoming album title is noted on the packaging ("Just Push Play") along with the catalog number for the album (62088), as well as nearly all of the identifying information requested by RIAA. The ISRC numbers for the two versions of the song on the CD can be read with the software products offered by Exact Audio Copy EAC (V.09 beta 3 from 6 March 2002) and the International Federation of the Phonographic Industry ("<u>IFPI</u>") (ISRC lister Version 1.0). See Exhibit D at 3-4 (screen shots of software identifying ISRC numbers). For a discussion of ISRC readers, see Section III.A.4 infra.

Based upon the statements included in the Exhibits to the Radio Broadcasters' Comments, RIAA simply does not understand how the Broadcasters can claim that "none of [the promotional releases given to radio stations] come with all or even most of the information RIAA would have radio stations report for each song they schedule." Radio Broadcasters' Comments at 26 (emphasis added).

#### 2. Identifying Information Is Available On Physical Promotional Product.

As noted in RIAA's initial comments, promotional product delivered in physical format generally provides most, if not all, of the information requested by the RIAA for royalty distribution purposes. See RIAA Comments, Exhibit G. Because services have questioned the availability of the requested information on promotional releases, RIAA has included declarations from executives at several labels describing their company's practices with regard to the availability of identifying data on promotional product ("CD PROs" and/or "CD-Rs"). See Exhibit B, Tabs 1-12. RIAA has also included examples of images of promotional releases with notations identifying the location of the information proposed for the uniform report of performances. Some of these examples are attached to the declarations in Exhibit B, and other examples are included in Exhibit E attached hereto. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, Attachments 1a-5b<sup>27</sup>; Tab 2, Declaration of Gretchen Anderson, Attachments 1a-2c; Tab 4,

<sup>&</sup>lt;sup>26</sup> Examples of CD PROs (CD Promotional) can be found at Exhibit G to RIAA's initial Comments and Exhibit E attached hereto. CD PROs are factory-prepared releases whereas CD-Rs (CD Recordable) are generally created by label personnel using a personal computer. See also Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 3.

<sup>&</sup>lt;sup>27</sup> Attachments to declarations are identified as follows: "[Exhibit Letter]-[Tab Number] Attachment [sequential number of attachments] [and, where the attachment is a unit of more than one page, lower case, sequential lettering]. For example, the designation "B-1 Attachment 1a" refers to the first page of the first Attachment to the Declaration of Peter M. Mullen (Exhibit B, Tab 1).

Declaration of John Dalton, Attachments 1a-2d; Tab 6, Declaration of Bruce Iglauer, Attachments 1a-4b; Tab 7, Declaration of Gerry Kuster, Attachments 1a-6; Tab 9, Declaration of Marina Scarlata, Attachments 1a-1b; Tab 10, Declaration of Rick Wietsma, Attachments 1a-6e; Tab 12, Declaration of Leslie Jose Zigel, Attachments 1a-9c; see also Exhibit E attached hereto. These examples are from large and small labels, different genres and multiple releases of the same sound recording. As one can see from the declarations of the label executives and the images of promotional product attached to their declarations, the majority of the identifying data requested by the RIAA is available on physical, promotional product released by record labels, notwithstanding the claims of some of the services. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 3; Tab 2, Declaration of Gretchen Anderson, ¶ 4; Tab 3, Declaration of Suzanne Berg, ¶ 4; Tab 4, Declaration of John Dalton, ¶ 4; Tab 6, Declaration of Bruce Iglauer, ¶ 4; Tab 7, Declaration of Gerry Kuster, ¶ 4; Tab 10, Declaration of Rick Wietsma, ¶ 4; Tab 12, Declaration of Leslie Jose Zigel, ¶ 4.

Several parties have claimed that because they receive releases of sound recordings in CD-R format versus factory-pressed CD PROs, they should not have to provide identifying information to copyright owners or their collecting entities. See e.g., Radio Broadcasters' Comments at 4, 27; Exhibit B, Statement of Brian Parsons, ¶ 7; Exhibit H, Statement of Rick Killingsworth, ¶ 10; Exhibit J, Statement of Dan Halyburton, ¶ 8. The argument appears to be that in instances where a record label has rushed a new release of a sound recording to a radio station for its immediate use, the station should be released from any obligation to provide the basic information needed for the proper distribution of statutory royalties. This argument has no merit.

First, the use of CD-Rs is not widespread. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 8; Tab 2, Declaration of Gretchen Anderson, ¶ 4; Tab 3, Declaration of Suzanne Berg, ¶ 7; Tab 4, Declaration of John Dalton, ¶ 7; Tab 5, Declaration of Dan Hubbert, ¶ 7; Tab 6, Declaration of Bruce Iglauer, ¶ 3 & 9; Tab 7, Declaration of Gerry Kuster, ¶ 4 & 7; Tab 8, Declaration of Heather McBee, ¶ 8; Tab 9, Declaration of Marina Scarlata, ¶ 8; Tab 10, Declaration of Rick Wietsma, ¶ 7; Tab 11, Declaration of Bill Macky, ¶ 4 & 7; Tab 12, Declaration of Leslie Jose Zigel, ¶ 7. Most promotional releases of sound recordings are provided in – to use the words of Amy Van Hook – "slickly packaged [containers], with photos of the performer, [and] color CD sleeve inserts . . ." Radio Broadcasters' Comments, Exhibit E, Statement of Amy Van Hook, ¶ 11.

Second, when CD-Rs are sent to radio stations, the stations will know the Artist Name, Sound Recording Title, Duration of the Sound Recording, Marketing Label, and, in most cases, the Release Year. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 3(a); Tab 4, Declaration of John Dalton, ¶ 7; Tab 6, Declaration of Bruce Iglauer, ¶ 9; Tab 11, Declaration of Bill Macky, ¶ 7; Tab 12, Declaration of Leslie Jose Zigel, ¶ 7. In many instances they are also likely to know the forthcoming Album Title for the sound recording and the Track Label (P)-Line will most likely be the same as the Marketing Label (i.e., the label providing the CD-R in the first place). See Exhibit B, Tab 4, Declaration of John Dalton, ¶ 7; see also B-7 Attachment 1a-b.

Third, CD-Rs are rarely the only product sent to a radio station. Record labels will generally send a radio station that received a CD-R containing a new release a follow-up CD PRO and/or a full-length promotional release of the album containing the

sound recording(s) included on the CD-R, so the station will eventually have all of the identifying information requested for the report of use. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 8; Tab 2, Declaration of Gretchen Anderson, ¶ 8; Tab 4, Declaration of John Dalton, ¶ 7; Tab 5, Declaration of Dan Hubbert, ¶ 7; Tab 6, Declaration of Bruce Iglauer, ¶ 5; Tab 7, Declaration of Gerry Kuster, ¶ 7; Tab 8, Declaration of Heather McBee, ¶ 8; Tab 12, Declaration of Leslie Jose Zigel, ¶ 7.

For example, Mr. Parsons of Clear Channel attached to his statement an image of a CD-R for the sound recording "Baby Got Back" by the band "The Grand Skeem." Mr. Parsons claims that insufficient identifying information was provided on this CD-R. Radio Broadcasters' Comments, Exhibit B, Statement of Brian Parsons, ¶ 7. But as the declarations attached at Exhibit B hereto indicate, most recipients of CD-R versions of sound recordings also receive CD PRO versions of the sound recording or the full-length retail album, on which more complete identifying information is provided. In Exhibit F attached hereto, RIAA has included images of the CD PRO and label packaging for the sound recording "Baby Got Back" by The Grand Skeem. As these images indicate, Artist Name, Sound Recording Title, Track Label (P)-Line, Duration of the Sound Recording, Marketing Label, Catalog Number and Release Year are included on the promotional product distributed by the record label.

Mr. Parsons also complained about the lack of information on promotional singles, including Jade Anderson's promotional single "Sugarhigh." The image of "Sugarhigh" included with Mr. Parson's statement, however, was a CD-R version of the sound recording, not a CD PRO as implied in his statement. On the CD PRO version of "Sugarhigh," an image of which is attached hereto as Exhibit G, the CD and the

packaging identify the following information: Artist Name, Sound Recording Title,

Track Label (P)-Line, Duration of the Sound Recording, Album Title, Marketing Label,

Catalog Number and Release Year.

Because recipients of promotional materials almost always receive identifying information for the sound recordings they perform, there is no reason for not requiring services to provide the requested information, particularly where royalty distributions cannot be made without identifying information.

## 3. Identifying Information Is Available For Promotional Products Delivered Electronically.

One entity participating in the joint comments of the Radio Broadcasters in this rulemaking, Clear Channel Communications, through the statement of Brian Parsons, appears to make the following argument – where a station is provided with an electronic delivery of a sound recording (e.g., a digital file containing an encoded copy of the sound recording not embodied in a physical product, such as an MP3 file that is transmitted to the intended recipient via electronic mail), the station should not be required to report information not included with the electronic delivery. See, Radio Broadcasters' Comments at 4; Exhibit B, Statement of Brian Parsons, ¶ 10. This argument grossly mischaracterizes the purpose for which these electronic deliveries are made and the surrounding context under which they are delivered, and fails to note the highly experimental nature of those electronic deliveries to Clear Channel by Sony (the label identified by Mr. Parsons).

As the attached declaration of Peter M. Mullen of Sony Music indicates, Mr.

Parsons failed to mention that when an electronic delivery of a sound recording is made to a station, it is usually done for either emergency purposes or test purposes. See Exhibit

B, Tab 1, Declaration of Peter M. Mullen, ¶ 12-16; see also id. Tab 2, Declaration of Gretchen Anderson, ¶ 6; Tab 8, Declaration of Heather McBee, ¶ 6.28 Moreover, the station will almost always promptly receive a follow-up delivery of a physical record in the form of either a CD PRO or the commercially released full-length retail album containing the version of the sound recording that was the subject of the earlier electronic delivery, which is sent for the express purpose of superseding the earlier electronic delivery. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 7; see also id., Tab 2, Declaration of Gretchen Anderson, ¶ 7; Tab 8, Declaration of Heather McBee, ¶ 6; Tab 11, Declaration of Bill Macky, ¶ 6. In fact, the recipient of the electronic delivery phonorecord is frequently obligated to destroy the electronic version upon receipt of the physical copy of the sound recording. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 6 and B-1 Attachment 1a; see also id., Tab 2, Declaration of Gretchen Anderson, ¶ 7.

#### 4. Identifying Information Is Available On Commercially Released Product.

As RIAA noted in its initial comments, the identifying information it requests for its proposed uniform report of use can almost always be located on or readily determined from commercially released product. See RIAA Comments, Exhibit F.<sup>29</sup> Much of the identifying information is printed on the physical CD, the container or the inserts

Many record labels do not distribute any promotional product in electronic form. <u>See</u>, <u>e.g.</u>, Exhibit B, Tab 3, Declaration of Suzanne Berg, ¶ 6; Tab 4, Declaration of John Dalton, ¶ 6; Tab 5, Declaration of Dan Hubbert, ¶ 6; Tab 6, Declaration of Bruce Iglauer, ¶ 6; Tab 10, Declaration of Rick Wietsma, ¶ 6; Tab 12, Declaration of Leslie Jose Zigel, ¶ 6.

<sup>&</sup>lt;sup>29</sup> Some labels generally distribute their commercially released product as "promotional product" rather than separately preparing distinct promotional material, although the latter is occasionally also provided. <u>See, e.g.</u>, Exhibit B, Tab 4, Declaration of John Dalton, ¶ 3-4.

included inside the container, or a combination of those three. The data elements include the Artist Name, Sound Recording Title, Track Label (P)-Line, Album Title, Marketing Label, Catalog Number, UPC and Release Year. There is also information that is readily available from the CD itself, although the information may not be in a printed format. This would include the Duration of the Sound Recording and the ISRC.

The Duration of the Sound Recording, if not printed on any of the materials provided noted above, can be readily determined by inserting the CD into any CD player. In fact, many of the commenting parties in this proceeding acknowledged that they already record the Duration of the Sound Recording in their databases. See SDARS Comments at 29 ("[E]ach [of XM and Sirius] enters the actual duration of the sound recording in its respective database."); Radio Broadcasters' Comments, Exhibit A, Statement of Jaime Kartak, ¶ 6; Exhibit B, Statement of Brian Parsons, ¶ 20; Exhibit C, Statement of Gregg Lindahl, ¶ 9; Exhibit G, Statement of Mary Guthrie, ¶ 10.; Exhibit I, Statement of Jim Tinker, ¶ 10; Exhibit J, Statement of Dusty Rhodes, ¶ 9.

There appears to be much confusion about the availability of the ISRC. As noted in RIAA's initial comments, the ISRC is a unique identifier for sound recordings. See RIAA Comments at 56. It is a key, embedded in the sound recording, that when plugged into a database containing the ISRC, can unambiguously provide all of the identifying information associated with the sound recording in the database (but reporting only the ISRC number provides no margin of safety in the event that numbers are misreported or data is incorrectly entered into a database). This is much like a social security number is a key, assigned to a person, that when plugged into the right database can provide all the identifying information about that person associated with the social security number.

Certain commenting parties have complained that the ISRC is unknown or unavailable to them and, therefore, the services should not have to provide this information. See Beethoven.com Comments at 2; Ultimate-80s Comments at 2; Music Choice Comments at 6; Radio Valve Comments at 1. Although not plainly visible on the CD, the ISRC number is embedded in the sound recording and can be read easily using currently available software - including free shareware and commercially released products. Attached hereto as Exhibit H is a list of four ISRC readers currently available that RIAA identified from publicly available sources. Contrary to popular belief, the ISRC is not a secret code maintained solely by the RIAA. See Radio Broadcasters' Comments, Exhibit B, Statement of Brian Parsons, ¶ 25 ("The fact of the matter is that this information is virtually never available and feasible to report, as RIAA has chosen to guard it as a secret."). Rather, the ISRC number is available to any person that utilizes an ISRC reader. See, e.g., Exhibit B-1 Attachments 2c-d (ISRC numbers for Korn's "Here to Stay"); B-2 Attachments 1c-1d (ISRC numbers for Ms. Jade's "Big Head"); B-4 Attachments 2e-d (ISRC numbers for songs on Bond's album "Born"); B-7 Attachments 5c-d (ISRC numbers for Britney Spears' "Overprotected"); B-10 Attachments 6d-e (ISRC numbers for The Flying Tigers album "The Flying Tigers"); B-12, Attachments 8c-d (ISRC numbers for Rocio Duval's "Nada"); C-3 (ISRC numbers for Nikka Costa "Everybody Got Their Something" Sampler) and D-3, 4 (ISRC numbers for Aerosmith's "Fly Away From Home").

The services' calls for access to an ISRC database, however, are unavailing. In order for an ISRC database to have meaning to a service, the service would first have to accurately and unambiguously identify the sound recording for which it is seeking an

ISRC in the database. This, however, is the very reason why RIAA is requesting the ISRC – to accurately and unambiguously identify the sound recording. <sup>30</sup> The services ignore the fact that associating each individual ISRC number to each individual sound recording cannot be accomplished without first knowing the identity of the sound recording. Only by having the services report such information can any such association be made.

As a further accommodation to services, RIAA proposes to have the services provide on their reports of use either the ISRC number that they read off the product that they use to make digital audio transmissions or the duration of the sound recording. With either of these identifiers, a collecting entity will be aided in distinguishing among similarly titled sound recordings or different versions of the same song (e.g., dance version, radio remix, etc.). Because the services select the sound recordings to be performed – copyright owners and performers have no control over this – the services should be required to report this information. See Exhibit B, Tab 2, Declaration of Gretchen Anderson, ¶ 10; Tab 3, Declaration of Suzanne Berg, ¶ 9; Tab 4, Declaration of John Dalton, ¶ 9; Tab 6, Declaration of Bruce Iglauer, ¶ 7; Tab 7, Declaration of Gerry Kuster, ¶ 9; Tab 8, Declaration Heather McBee, ¶ 10; Tab 9, Declaration of Marina Scarlata, ¶ 10; Tab 10, Declaration of Rick Wietsma, ¶ 9. The services are, therefore, in

<sup>&</sup>lt;sup>30</sup> As Mr. Parsons of Clear Channel Communications acknowledged, receiving data from a record company or a third-party provider is only part of the solution; one "would still have to figure out how to integrate [the] database with [one's] current data systems." Radio Broadcasters' Comments, Exhibit B, Statement of Brian Parsons, ¶ 31.

possession of the sound recordings that contain duration information or the ISRC number and should be required to report one of these identifying elements on the reports of use.<sup>31</sup>

# B. Complying With Reporting Obligations Is Not Technologically Infeasible, Unworkable Or Unduly Burdensome.

Several commenting parties criticize the proposed reporting requirements as technologically infeasible, unworkable and unduly burdensome. Many of these parties claim that systems are not available to provide reporting, <sup>32</sup> the inputting of data to provide the requested reporting would be time consuming <sup>33</sup> or that it is too expensive to provide such reporting. <sup>34</sup> To the contrary, RIAA believes that: (1) technological solutions already exist and are used in the marketplace or can rapidly be deployed to meet market needs; (2) the claims about the time required to input necessary data elements are overblown; and (3) the costs of deploying reporting technologies are grossly inflated. Moreover, for the reasons identified above, the reporting requested by RIAA is necessary for royalty collection, royalty distribution and the enforcement of the statutory requirements. The services that have questioned the need for all of the data elements

<sup>&</sup>lt;sup>31</sup> Not all record labels assign an ISRC number to all released product. While RIAA is hopeful that all record labels will one day assign ISRC numbers to all released product, that is not guaranteed. However, among those who do, the vast majority also include the ISRC number on CD PRO releases. See Exhibit B, Tab 2, Declaration of Gretchen Anderson, ¶ 4 (95%); Tab 3, Declaration of Suzanne Berg, ¶ 4 (80%); Tab 4, Declaration of John Dalton, ¶ 4 (90%); Tab 6, Declaration of Bruce Iglauer, ¶ 4 (100%); Tab 7, Declaration of Gerry Kuster, ¶ 4 (100%); Tab 8, Declaration of Heather McBee, ¶ 4 (100%); Tab 9, Declaration of Marina Scarlata, ¶ 4 (90%); Tab 10, Declaration of Rick Wietsma, ¶ 4 (100%); Tab 11, Declaration of Bill Macky, ¶ 4 (100%); Tab 12, Declaration of Leslie Jose Zigel, ¶ 4 (85%).

<sup>&</sup>lt;sup>32</sup> See 3WK Comments at 4; Radio Broadcasters' Comments at 31.

<sup>&</sup>lt;sup>33</sup> <u>See</u> Collegiate Broadcasters, Inc. Comments at 3; NFCB Comments at 3; College Broadcasters' Comments at 18 n.17; ARBA Comments at 3; Radio Broadcasters' Comments, Exhibit D, Statement of Mike Cary, ¶ 6.

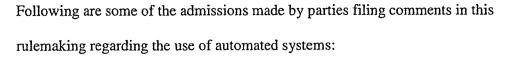
<sup>&</sup>lt;sup>34</sup> Ultimate-80s Comments at 3; Radio Broadcasters' Comments, Exhibit A, Statement of Jaime Kartak, ¶7; Exhibit B, Statement of Brian Parsons, ¶ 24; Exhibit C, Statement of Gregg Lindahl, ¶ 10; SDARS Comments at 10.

proposed by RIAA have failed to explain how the types or amounts of data they propose to report would provide copyright owners with reasonable notice of the statutorily permitted use of their sound recordings and ensure the proper and efficient allocation of statutory royalties to the copyright owners and performers entitled to such royalties.

### 1. The Vast Majority Of Services Use Automated Systems To Deliver Programming To Listeners.

The comments filed by most services indicate that the business of delivering music to listeners, whether it be through terrestrial radio broadcasts, satellite digital audio radio service transmissions or Internet-only webcasting, is largely done through the use of automated systems utilizing encoded phonorecords of sound recordings. These systems include scheduling software, their databases and digital automation systems. The scheduling software generates playlists according to certain user-defined parameters. The database attached to the scheduling software will include the meta-data for sound recordings and may also include a digital audio file for sound recordings. The digital automation system receives instructions from the scheduling software and transmits the sound recordings.

The products currently available in the market allow programming directors to access a library of music and generate a playlist. See Exhibit I. Some systems do not even require the intervention of a programming director and merely develop playlists using computer algorithms. See RIAA Comments at 40-42. The sophistication and price of scheduling tools varies. While there are still some smaller broadcasters that spin vinyl recordings or individual CDs when creating playlists, the majority of radio stations and nearly all Internet-only webcasters use automated systems to facilitate transmissions.



- o "XM uses a digital asset management system designed especially for XM by Dalet Digital Media Systems. . . . The ingestion of metadata into the Dalet database system is a labor-intensive data entry and research process that varies significantly depending on the source of the programming. . . . During this process, metadata from those CDs is entered into Dalet by a musician librarian clerk who takes the information from an album or CD cover. Once the ingestion process is complete, a program director or DJ selects the music he wants to play from the music available in the Dalet database, and the metadata, once entered, is associated with that recording. A report of music and associated metadata can then be generated." SDARS Comments at 6.
- "Sirius uses a reporting system that is a feature of Selector, Sirius' music scheduling software." <u>Id.</u> at 9.
- "Among the music format stations, most use music scheduling software to create the desired balance of tempo, mood, and variety. Some radio stations use digital automation systems to manage their over-the-air broadcasts...." Radio Broadcasters' Comments at 4.
- "All of our Chicago stations use Selector software, by RCS, to schedule music." Id., Exhibit A, Statement of Jaime Kartak, ¶ 6.
- o "Most of our stations create their playlists using a music scheduling program known as Selector. . . . Most of our stations employ a digital automation system (usually Prophet) to pull the music listed in the playlist from the station's music library and actually play it." <u>Id.</u>, Exhibit B, Statement of Brian Parsons, ¶¶ 18-20.
- "A [Digital Automation System] is generally used by radio stations to store and play music, commercials, and other pre-recorded materials, leaving appropriate time for live intervention from radio show hosts. Cox Radio currently employs six different systems with various capabilities...." Id., Exhibit C, Statement of Gregg Lindahl, ¶¶ 12-13.
- "Entercom stations operate using at least ten different digital automation systems (DAS). These DAS include programs from Dalet (at least two versions in use), AudioVault (at least three versions in use)[,] Scott Studios, Enco, Maestro, AudioWizard from Prophet, and RCS. The DAS programs are used to orchestrate the on-the-air programming. They coordinate music, traffic, weather, sports, DJ chatter time, and other programming elements based upon schedules we upload from our scheduling software." Id., Exhibit E, Statement of Amy Van Hook, ¶ 3.

- "Our stations use Music Master 2.0 to schedule their programs, and the Dalet digital automation system." <u>Id.</u>, Exhibit F, Statement of Harv Hendrickson, ¶ 4.
- "Our daily playlist is generated by our Music Director, Elizabeth Meza, using a computer program called MusicMaster Lite." <u>Id</u>., Exhibit G, Statement of Mary Guthrie, ¶ 9.
- o "Most of our stations schedule their programming using MusicMaster....
  Our stations also use three different digital automation systems, ENCO,
  Prophet, and Scott Studios, which create and air broadcast programming
  based on information they receive from MusicMaster's playlist." <u>Id.</u>,
  Exhibit H, Statement of Rick Killingsworth, ¶¶ 11-12.
- "Even within our Los Angeles group of stations, we use two different music-scheduling programs and two different digital automation systems (DAS) to effectuate our broadcasts. . . . Some of our stations use a program called Selector. . . " <u>Id</u>., Exhibit I, Statement of Jim Tinker, ¶¶ 7-9.
- "Our stations use the popular Selector software by RCS to schedule the music they play. . . . All of our stations that use a Digital Automation System use the Enco DAS to actually play the music and schedule the other elements of the broadcast." Id., Exhibit J, Statement of Dan Halyburton, ¶¶ 9-10.
- "At our most sophisticated station, our flagship WAYM-FM in Tennessee, the music director uses a computer program called Powergold to generate playlists of music." Id., Exhibit K, Statement of Dusty Rhodes, ¶ 13.
- "While some major AM/FM Webcasters use live, human announcers, the bulk of their programming is sequenced and transmitted by computer software, making comprehensive and accurate recordkeeping simple. . . . Most large AM/FM Webcasters (and most, but not all, internet-only webcasters) store their sound recordings in digital format on a central harddrive. This makes the process of cataloging, organizing, and documenting the music library much easier." Harvard Comments at 9.
- "Whereas some stations do use off-the-shelf automation software to play music, many stations like 3WK have developed proprietary software that plays music and displays song titles." 3WK Comments at 4.

Most of the Internet-only services that participated in the Webcaster CARP also rely upon sophisticated automated systems to deliver programming to listeners. <u>See</u>

RIAA Comments at 40-42. Descriptions of some of the automated systems mentioned

above by services filing comments in this rulemaking are included in Exhibit I attached hereto. RIAA obtained the descriptions of the products mentioned in Exhibit I from the websites of the companies manufacturing and/or marketing those products.

Based upon the statements of the services themselves, it simply cannot be true that providing the reports of use requested by the RIAA is impossible, impracticable or too expensive. Each one of the services presently using an automated system elected to use such a system, and their reasons for doing so probably included the effort to streamline the process of selling advertising and providing programming to listeners. Many of these services may also have embraced automated systems because of their obligation to provide specific reporting information to performing rights organizations ("PROs") for the use of musical works. The use of the automated systems facilitates the reporting of information on musical works. Since broadcasters have never had an obligation to provide reports of use to sound recording copyright owners, however, it comes as no surprise that their current systems may not contain all of the data elements needed by collecting entities for the distribution of Section 114 statutory royalties. But any alleged lack of current availability will surely be rectified following the Copyright Office's adoption of final regulations. It is reasonable to expect that the market will respond to those regulations.

In order for automated systems to function, the services must upload sound recordings into a database and associate those sound recordings to meta-data, otherwise

<sup>&</sup>lt;sup>35</sup> <u>See</u> CPI Interactive Comments at 2 ("The Internet offers a much more accurate record. When a title is performed we can PROVE it. We know how many times it is performed. Our server could easily send daily (hourly?) reports to the performance rights agencies upon which they could pay the rights owners.") (emphasis in original); DiMA Comments at 11 ("[W]ebcast services that perform music from individual Footnote continued on following page.

the systems could not serve their intended purpose. Diagrams of the processes involved for simulcasting and Internet-only webcasting are included at Exhibit I attached hereto.<sup>36</sup> Several commenting parties described this simple process, which only takes several minutes to enter all of the meta-data for an individual sound recording that can thereafter be used for all reporting purposes.<sup>37</sup> The services have obviously developed business practices that make such activities routine, and there is simply no reason to believe that their current business practices cannot (and should not) be modified to incorporate the additional data elements that are needed for the distribution of sound recording performance royalties. See RIAA Comments at 46.

To the extent that services have complained about the amount of time it would take to enter the identifying information for sound recordings into their databases, their arguments are unpersuasive.<sup>38</sup> First, as noted above, it only takes a service a few minutes

song files on servers . . . [have] servers [that] can track accurately the number of times in which a performance has been requested.").

<sup>&</sup>lt;sup>36</sup> In the Webcaster CARP, the services in that proceeding relied upon, *inter alia*, the expert testimony of Professor Jonathan Zittrain, Harvard Law School. Attached to Professor Zittrain's written testimony (Tab 2) was an exhibit, included herein at Exhibit J, Tab 1, which provided an "Overview" of how music is collected and stored on a company's server and then transmitted to the user. In step 1 on Professor Zittrain's exhibit, he noted that services have to "Gather & Prepare Data; File & Index Data; Begin Data Stream." The services participating in this rulemaking that use automated systems are already gathering and preparing data and filing and indexing that data for transmission. See also Exhibit J, Tabs 2 & 3. RIAA's data requests merely ask the services to gather and report a few more data elements that are needed for the distribution of statutory royalties for the digital audio transmission of sound recordings.

<sup>&</sup>lt;sup>37</sup> See, e.g., Radio Broadcasters' Comments, Exhibit D, Statement of Mike Cary ("It takes our music programmers between three and five minutes to enter the data we currently track about a song into our scheduling software."); Exhibit G, Statement of Mary Guthrie, ¶ 10 ("Not counting the evaluation time, it takes at least 5-7 minutes to enter the information we record into our database for each new song."); Exhibit I, Statement of Jim Tinker, ¶ 17 ("Even entering the key fields we regularly track, it takes our music directors approximately five to eight minutes to make the appropriate judgments about a song and enter the relevant information into both the scheduling software and the DAS.").

<sup>&</sup>lt;sup>38</sup> See, e.g., College Broadcaster Comments at 18 n.17; Radio Broadcasters' Comments, Exhibit D, Statement of Michael Cary, ¶ 6.

to enter data about an individual sound recording into a database. Second, services are already recording meta-data in their databases, so requiring them to record additional identifying information could not possibly be deemed burdensome. Third, any estimates of the total amount of time it would take a service to update an entire library of sound recordings misinterprets RIAA's request. RIAA is not requesting that services be obligated to enter meta-data for every sound recording in their database. Rather, RIAA has only sought to have them record – and report – meta-data for the sound recordings that they actually perform. Therefore, the statement that it would take 30,000 hours to enter meta-data for 25,000 compact discs and vinyl recordings<sup>39</sup> (or any other time estimates for recording meta-data for entire libraries of sound recordings) is meaningless unless the service makes digital audio transmissions of each one of the individual sound recordings on each of those 25,000 compact discs or vinyl recordings in the possession of the service.

2. Automated Systems Currently In Deployment Are Likely To Be Modified Once The Copyright Office Adopts Final Regulations For Notice And Recordkeeping For The Use of Sound Recordings Under Statutory License.

The fact that certain automated scheduling and reporting systems in use today by broadcasters may not contain fields for recording some of the data elements sought by RIAA (and RLI) is not due to the unavailability of that data on sound recordings, but the result of the historical anomaly that sound recording copyright owners have only recently come to enjoy an exclusive right of public performance in the United States. Put simply, in the absence of a performance right, broadcasters had no need to track the information

<sup>&</sup>lt;sup>39</sup> See College Broadcaster Comments at 18 n.17.

necessary for payment of artists and sound recording copyright owners, and thus, their software vendors had no reason to include that functionality in their products. By contrast, performance royalties have long been payable for the use of musical works, and in a development that should not be surprising to anyone, automated systems were developed for tracking the use of such works. Because a need developed in the marketplace, third party vendors even developed automated systems that facilitated the tracking and reporting of the use of musical works. There can be no doubt that similar solutions will arise in the marketplace to respond to whatever regulations the Copyright Office adopts for reporting the use of sound recordings under statutory license. See Exhibit I (summary of promotional claims made by vendors offering solutions for services making digital audio transmissions of sound recordings). Because market-

<sup>&</sup>lt;sup>40</sup> For an example of a system developed for reporting performances for musical works, <u>see</u> Radio Broadcasters' Comments, Exhibit I, Statement of Jim Tinker, Attachments at 1 of 4 and 2 of 5. In these attachments, Mr. Tinker shows how Salem Communications' Selector program provides data fields including "Composers," "Publishers," "Arrangers" and "License." <u>See also id.</u>, ¶ 9.

<sup>&</sup>lt;sup>41</sup> These systems were not paid for or subsidized by musical work copyright owners, nor were their databases populated with information provided by PROs. Hence, the Copyright Office should reject out of hand the suggestions that copyright owners or their agents, SoundExchange and RLI, subsidize efforts of the services to comply with notice and recordkeeping requirements by turning over for the services' use, presumably for free, the databases they have developed at enormous expense. See DiMA Comments at 2-3; Herbert W. Robinson ("Robinson") Comments at 2; Music Choice Comments at 2-3. Such an appropriation of private property would be unfair and illegal. It also misses the point of the proposed regulations. As explained in Section V.A, services should be required to report enough information to permit designated agents to match confidently their performances to the agents' databases, and RIAA has narrowed the required information to only what it believes to be the necessary elements. Given this willingness, there is no need for any service to have access to the entire databases of SoundExchange and RLI because SoundExchange and RLI will use the information provided by the services to match their performances to the agents' databases.

<sup>&</sup>lt;sup>42</sup> Although not providing technology solutions to services, the company "TM Century" does provide many services with custom compilation CDs of new releases and catalog recordings and has expressed an intent to offer information on its custom compilations that assists services in complying with recordkeeping requirements. See Exhibit B, Tab 13, Declaration of David Graupner; see also SDARS Comments at 11; Radio Broadcasters' Comments, Exhibit I, Statement of Jim Tinker, ¶ 6. As Mr. Graupner states in his declaration, "TM Century is committed to promptly modifying its expanded database – once the Copyright Office issues final notice and recordkeeping regulations – such that the database includes all of the data fields required by the new regulations." Exhibit B, Tab 13, Declaration of David Graupner, ¶ 5.

based solutions are likely to develop, the Copyright Office should not believe the hysteria that solutions will not be available or that they will cost hundreds of thousands or even millions of dollars.<sup>43</sup> The development of solutions will likely be handled by the free market.

3. New Products And Services Are Likely To Be Developed For Commercial Use Following The Copyright Office's Adoption Of Final Recordkeeping Regulations.

As noted above, there is currently no available master database that contains meta-data for every sound recording released to the public in the United States. The current unavailability of such a database, however, is not an indication that such a database will not be developed in the future. As mentioned in the proceeding section, where needs arise in the marketplace, entrepreneurs frequently develop solutions for those needs. That is how a free market economy functions.

While many services in this rulemaking call for access to a database, they unfortunately want free access and updates to such a database. If one expects the market to develop solutions for this need, then one cannot expect a business to undertake the time and expense of developing and maintaining such a database only to have that database expropriated by the government for the benefit of commercial businesses. But if the Copyright Office adopts regulations that would benefit from the use of such a

<sup>&</sup>lt;sup>43</sup> Mr. Parsons' (Clear Channel Communications) unsworn statement implies that the software vendor Information Concepts quoted Clear Channel a price of \$1 million for the development of software middleware that could be used for providing reports of use of sound recordings. Radio Broadcasters' Comments, Exhibit B, Statement of Brian Parsons, ¶ 31. Mr. Parsons also implies that the estimate included additional costs of several million dollars for software support and other costs. Id. As the sworn declaration of Wayne Beekman of Information Concepts Inc. indicates, a copy of which is included as Exhibit K hereto, Information Concepts never provided Clear Channel with any such cost estimates, let alone estimates for millions of dollars.

database – or other tools and services that can readily be provided – then it is likely that recordkeeping solutions will rapidly be deployed at reasonable prices.<sup>44</sup>

For example, one commenting party in this proceeding, Websound, has told Ms. Kessler of SoundExchange that it has developed a solution that can provide reports of use containing the data requested by the RIAA in its initial comments. See Exhibit L attached hereto. According to Websound: "[it] has developed and tested a method for efficiently and accurately tracking performances based on server log data, cross-referenced with song specific and playlist data, and correlating the result into a report format consistent with the proposed guidelines. We are pleased to inform the RIAA that Websound intends to offer this end to end reporting solution to any and all webcasters on an ongoing basis." Id. (emphasis added)

RIAA has also been notified by Reliacast, a company based in Herndon, Virginia, of products that measure audience size and record content delivery. In a letter to Ms. Barrie Kessler dated April 18, 2002, a copy of which is enclosed as Exhibit M hereto (along with other materials from Reliacast), Glenn Bloom, Director of Sales for Reliacast indicated that Reliacast "can satisfy the reporting requirements specified in this . . . [rulemaking] and we are willing to deploy a solution once the Copyright Office adopts final regulations to demonstrate our solution, first hand." Exhibit M at 2 (emphasis added). Reliacast claims that its product can collect information on the Start Date and Time of the Sound Recording's Transmission, Total Number of Performances and Duration of the Sound Recording, and "[a]ll of the other [requested data] fields could be

<sup>&</sup>lt;sup>44</sup> According to RLI, at least three companies offer marketing databases for sound recordings: AMG, Muse and Gracenote. RLI Comments at 4.

imported from other production/scheduling systems and delivered via standard report using our software with some custom modifications." <u>Id</u>. at 1.

Reliacast's principal product for tracking this information is the "Audience Manager," described as follows by Reliacast:

Reliacast's Audience Manager system is an easy-to-use, web-based application that can be seamlessly integrated into any organization employing unicast or multicast streaming. At its core is the **Reliaserver**<sup>TM</sup>, the webcast manager and repository of all data collected during a webcast. Communication to the Reliaserver takes place with the help of Reliacast's proprietary Secure Live Event Access Protocol (SLEAP) that uses cryptography to maintain privacy and integrity of data flows. . . . In a seamless and unobtrusive way, this client-side presence passes participant behavior back to the Reliaserver, all while respecting privacy concerns. During a webcast, the Reliaserver logs participant data in its database for reporting via a customizable reporting engine. Reliacast's robust reporting system offers a wide variety of standard and customized reports that are designed to measure results and answer these important questions:

- > Participant Profile "Who watched?"
- > Audience Size "How many?"
- > Participant Behavior "What did they do?"
- > Participant Experience "How positive was the experience?"

Exhibit M, Corporate Profile at 2 (emphasis in original).

Another company that may deploy a product commercially for services seeking recordkeeping solutions is RLI, a Designated Agent for the receipt of eligible nonsubscription transmission royalties. According to the testimony of Mr. Ronald Gertz in the Webcaster CARP, RLI has developed a substantial, but not complete, database on sound recordings:

- Q: You also talked about Songdex data base, do you recall that testimony?
- A: Yes
- Q: And this is a data base that has information on both sound recordings and musical works?
- A: Yes.

- Q: Approximately how many separate sound recordings do you have information for in the Songdex database?
- A: Millions....
- Q: Well, what kind of information do you have on sound recordings?
- A: In sound recordings, we keep the album that the song came from, the recording title, the artist, the distributing label, the label that owns the copyright. We often have the UPC code, catalog numbers and various other detail that allows us to match titles to various data inputs.
- Q: And there are millions of copyrighted sound recordings in your data base?
- A: Yes.

Webcaster CARP Tr. 10999-11000 (Gertz) (emphasis added). In light of RLI's close working relationship with many copyright users, including major terrestrial broadcasters, it is not inconceivable that RLI will market its database of millions of sound recordings to statutory services or to third parties that develop recordkeeping and reporting tools. Again, the Copyright Office should not heed the call of services to expropriate the database of sound recordings developed by RLI, but should instead permit RLI to determine how its database may be marketed for use by services operating under the Section 112 and 114 statutory licenses. Cf. Radio Broadcasters' Comments at 63-64 (record labels should not be entitled to receive for free through the rulemaking data that has substantial value that the labels otherwise have to pay for in the free market).

4. Providing Automated Reports Of Use Is Not Burdensome And Handwritten Reports Of Use Should Not Be Permitted.

The Copyright Office should reject any calls to permit services to provide reports of use in handwritten form. See Radio Broadcasters' Comments at 40. With the delivery

<sup>&</sup>lt;sup>45</sup> RIAA is surprised that not a single service called for access to the database of sound recordings maintained by RLI, particularly when RLI appeared on behalf of and was working with the webcasters and broadcasters that participated in the Webcaster CARP. One is left to wonder why so many broadcasters called for access to an RIAA database when they have knowledge of an extant database containing information on millions of sound recordings. See Radio Broadcasters' Comments, Exhibit A, Statement of Jaime Kartak, ¶ 7; Exhibit E, Statement of Amy Van Hook, ¶ 17; Exhibit F, Statement of Harv Hendrickson, Concluding Paragraph.

of music becoming more and more automated, including the use of computer systems to simulcast an over-the-air AM or FM broadcast signal on the Internet, there is simply no reason to permit a service to provide a handwritten report of use that will necessarily have to be entered into a database by a collecting entity in order for statutory royalties to be distributed. By asking for permission to provide handwritten reports of use, services are once again attempting to shift their burden of complying with the statutory license to copyright owners and performers, who would have to pay for entering any handwritten data into an automated database. Such burden shifting should not be permitted, and each service should be required to provide a report of use in a "standard machine-readable medium, such as diskette, optical disc, or magneto-optical disc." See RIAA Comments, Exhibit A Sec. 201.36(g).

Any claim that providing automated reports would create an undue burden for commercial stations is belied by some of the efforts already undertaken by noncommercial radio stations. For example, Harvard's WHRB station in Boston, Massachusetts is a college radio station "operated and administered by a volunteer staff composed of undergraduates of Harvard College . . . ." Harvard Comments at 3.

Operating on an annual budget of less than \$100,000 per year, id. at 4, WHRB manages to provide an electronic playlist of all sound recordings that it has performed or intends to perform on its website. A printout of WHRB's March-April 2002 playlist (from the website <a href="www.whrb.org">www.whrb.org</a>) is attached hereto as Exhibit N. If WHRB — a volunteer-operated college radio station — can find the time to provide printed playlists on its website for use by its listeners, then it and other broadcast stations can surely provide machine-readable reports of use to collecting entities to facilitate payment of statutory

royalties to the copyright owners and performers whose works they are performing under a compulsory license.

# 5. There Is No Basis For Exempting Third-Party Programming On Reports Of Use.

Radio Broadcasters and XM/Sirius state that they transmit a substantial amount of programming provided by third parties (i.e., so-called syndicated programming), and that information about the recordings performed in those programs is often not provided by the third-party programmer and in any event would likely not meet the proposed requirements. Radio Broadcaster Comments at 32; SDARS Comments at 7 & 9. They assert that they should be exempt from providing reports of use for syndicated programming unless the third-party programmer provides the service with the required information. See Radio Broadcasters' Comments, Exhibit C, Statement of Gregg Lindahl, ¶ 17; Exhibit H, Statement of Rick Killingsworth, ¶ 6. In other instances, services claim that they should only be obligated to "exert a reasonable, good faith effort to obtain information from . . . third-party programmers . . . . " Radio Broadcasters' Comments at 35. These proposals fail to provide copyright owners with reasonable notice of use of their sound recordings, and create perverse incentives to minimize the amount of information available to copyright owners to effectuate a proper distribution of royalties by shifting more programming to third parties. These proposals should be rejected by the Copyright Office.

Services elect to enter into contractual arrangements with third-party programmers for the carriage of their programming. Copyright owners and performers have no control over these arrangements and no practical and economical method for monitoring these arrangements or the syndicated programming. Therefore, it is the

service that elects to operate under the statutory license and, at the same time elects to transmit syndicated programming, which is uniquely positioned to ensure that the necessary information is provided to copyright owners and performers. Whether the service or the third-party programmer actually compiles the information and how the additional cost, if any, of compiling such information should be allocated, are matters that can be resolved by contract between those parties. But if they are not forced to address these issues, each inevitably will take the path of least resistance, and copyright owners and performers will be deprived of the information necessary to make a proper distribution of what is assertedly a substantial use of recorded music. Accordingly, services must bear the burden of providing the required reports of use even when they transmit syndicated programming.

To permit services to avoid reporting information on the use of sound recordings in syndicated programming would create a tremendous exception to the recordkeeping requirements that might negate most if not all of the recordkeeping requirements. Such an exception undoubtedly would promote the further use of syndicated programming, if only as a means of avoiding reporting requirements. The result of such an exception could only be to make it more difficult or more expensive to distribute, or to skew the distribution of, a fair share of royalties to the copyright owners and performers whose sound recordings are contained in syndicated programming.

RIAA also doubts claims that requiring reports of use for syndicated programming will result in widespread programming blackouts. See Radio Broadcasters' Comments, Exhibit B, Statement of Brian Parsons, ¶ 33. Broadcasters simulcasting their programming over the Internet are already engaging in a form of "programming

blackouts." They strip out their local, over-the-air advertisements and replace them with national advertisements. See Webcaster CARP Tr. 5973-74 (Donahoe) (Aug. 24, 2002) & RIAA Exhibit 164-DPX (June 2001 Clear Channel/Hiwire, Inc. Press Release Describing Advertising Insertion Technology). If services were not able to obtain information on the sound recordings contained in a syndicated program, then they could strip out the syndicated program and replace that with programming for which identifying information on sound recordings is available.

Just as the market adjusted to developing technology solutions for reporting the use of musical works to PROs or the use of sound recordings by preexisting subscription services after the Copyright Office's notice and recordkeeping rulemaking for such services, the market will adapt to a world where reports of use are required for syndicated programming. No party has presented evidence to the Copyright Office that such an adjustment will not be made in the marketplace. If such reporting is required, then services will demand and third-party programmers will provide such notice. 46

6. Nothing About The "Proprietary" Nature Of Playlists Warrants A Change In The Proposed Regulations.

Several of the commenting parties asserted that their playlists are "commercially sensitive" and "proprietary" information. See Radio Broadcasters' Comments at 62; Id., Exhibit A, Statement of Jaime Kartak, ¶ 14; DiMA Comments at 7; Music Choice

<sup>&</sup>lt;sup>46</sup> XM has stated that requiring reports of use for syndicated programming would require the development of new systems. See SDARS Comments at 12 ("The Proposed Rule would require the establishment of entirely new systems and recordkeeping processes that are simply not needed by these third-party programmers in the ordinary course of their primary business."). But there is no reason why the development of new systems should be an obstacle to the Copyright Office's adopting regulations that require reports of use for syndicated programming. If such reporting is needed for the collection and distribution of statutory royalties and for the enforcement of the statutory requirements, then the Copyright Office must adopt those regulations and the market will adjust accordingly.

Comment at 7-8. The thrust of these claims seems to be to reduce the amount of information that these services must report. This reasoning should be rejected, for two reasons.

First, as the Copyright Office concluded in the Original Determination, playlists that are publicly performed are "historical fact." Original Determination, 63 Fed. Reg. at 34,295. Indeed, they are by their nature known to the public. As such, they are not trade secrets or confidential information that would warrant limitations on their dissemination.<sup>47</sup>

Second, if there were legitimate concerns about the nature of the data, any such concerns would be addressed adequately by the Copyright Office's proposed regulations limiting the use of the reports. See Proposed 37 201.36(d)(2) & (h), Notice at 5765; see also Original Determination at 34,295. Nothing in the services' claims to proprietary data warrants a change in the proposed regulations.

<sup>&</sup>lt;sup>47</sup> Even where, as DiMA suggests, proprietary software may be used to generate a different playlist for each individual listener, the listener is at liberty to disclose the playlist, so it does not satisfy any legal definition of trade secret: See Uniform Trade Secrets Act, § 1(4) (defining "trade secret" to mean information that "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."). Even if a service might argue that one listener's playlist is somehow confidential because it cannot be discovered by another member of the public, this circumstance mostly serves to prove that such playlists must be reported for compliance purposes because monitoring through simple public access is not possible.

#### IV. THE SERVICES HAVE NOT PROPOSED REASONABLE REPORTING REQUIREMENTS

A. Many Of The Services That Oppose Reporting The Information Contained In the Notice Of Proposed Rulemaking Have Failed To Propose Alternative Reporting Requirements That Would Be Sufficient For Royalty Collection And Distribution.

As noted above, RIAA believes that each service proposing reporting requirements bears the burden of justifying how those reporting requirements will provide copyright owners or their agents with reasonable notice of use of sound recordings that facilitates the accurate collection and distribution of statutory royalties. Unfortunately, most of the services providing comments neglected to satisfy this obligation. Instead, they merely criticized the Copyright Office's proposal, alleged that the RIAA was seeking data for ulterior motives and sought to perpetuate the current practices used in the terrestrial radio world where different works are transmitted through a different medium.

1. The Proposals To Report Only Artist Name And Sound Recording Title On Reports Of Use Would Not Permit The Accurate Distribution Of Statutory Royalties To Copyright Owners And Performers.

Several parties have stated that the only information needed on a report of use for royalty distribution purposes is the Artist Name and the Sound Recording Title. See

<sup>&</sup>lt;sup>48</sup> For the purposes of this Section IV.A, RIAA focuses only on the data needed for royalty collection and distribution. This is because many services filing comments in this rulemaking oppose the reporting of information for ensuring compliance with the statutory requirements. <u>See</u>, e.g., Radio Broadcasters' Comments at 17-21; SDARS Comments at 21-24. However, irrespective of the information needed for testing compliance with the statutory requirements, most of the information requested by RIAA is needed to enable a collecting entity to distribute the statutory royalties. Therefore, the data that various services propose to report would not be sufficient for properly allocating statutory royalties among all parties entitled to receive a portion of those royalties.

Radio Broadcasters' Comments at 41; <sup>49</sup> Ultimate-80s Comments at 2-3, 5; College Broadcaster Comments at 14 ("The College Broadcasters acknowledge that the following fields of information are necessary to facilitate administration of the licenses, including collection of royalties and expedited distribution of royalties to copyright owners: sound recording title and featured artist. The remaining information requested does not relate to the primary purpose of the notice and recordkeeping requirements."); SDARS Comments at 25 n.4 ("[T]here is reason to believe that artist and title alone suffice to identify a sound recording. Even when a particular song performed by a particular artist appears on more than one album – *i.e.*, on the artist's original release information and on compilation albums – only in the rarest cases would the copyright owner change based on the album on which the song appears.").

Services offer varying reasons why only Artist Name and Sound Recording Title should be provided. Ultimate-80s, for example, says that requiring any other information "is either extremely difficult, cost prohibitive, and/or simply impossible to attain." Ultimate-80s Comments at 2. Radio Broadcasters, on the other hand, believe that "[i]n the vast majority of cases, provision of title and artist information will be sufficient to identify a sound recording." Radio Broadcasters' Comments at 41; see also SDARS Comments at 25 n.4.

<sup>&</sup>lt;sup>49</sup> Broadcasters state in their comments that Barrie Kessler, the Chief Operating Office of SoundExchange, "testified during the nonsubscription services proceeding that for all sound recordings except possibly some included on compilations, title, artist and album name were sufficient to identify the track." Citing Docket No. 2000-9, CARP DTRA 1 & 2, Tr. 11,828-30 (Kessler). This mischaracterizes Ms. Kessler's testimony. Ms. Kessler's written and oral testimony indicates that the data requested on reports of use is needed "to accurately differentiate one sound recording from another." Tr. at 11,874. It is the differentiation among various sound recordings that is the most difficult task of a collecting entity, and the reporting regulations to be adopted by the Copyright Office must take these difficult situations into account.

Mr. Parsons, of Clear Channel Communications, seems to believe that because industry trade publications "routinely identify songs by title and artist alone," services should only have to report similar information on reports of use under statutory license. Radio Broadcasters' Comments, Exhibit B, Statement of Brian Parsons, ¶ 11. Mr. Parsons further alleges that "record labels routinely send our radio stations songs with only title and artists information provided, along with the song's length . . . " Id. In Exhibit O attached hereto RIAA has provided a copy of the March 8, 2002 Radio and Records page for "Hot AC Playlists" cited by Mr. Parsons and attached to his statement. Following that page is a spreadsheet prepared by RIAA that lists the five Clear Channel stations (KBIG/Los Angeles; KYSR/Los Angeles; KDMX/Dallas-Ft. Worth; WLCE/Philadelphia; and KMXP/Phoenix) that were listed on the first page of that attachment and the songs that were listed as having been played on those Clear Channel stations. Following the spreadsheet are images of a few of the promotional versions of the sound recordings (or the packaging) sent to radio stations and played by Clear Channel stations that RIAA was able to obtain for this rulemaking. As these images show, and contrary to the assertions of Mr. Parsons, not only is Artist Name and Sound Recording Title not the only information contained on those promotional products, but also the majority of the identifying information requested by RIAA is contained on the products.

In response to claims made in the initial comments, RIAA further explains herein why reporting only Artist Name and Sound Recording Title alone is insufficient for distributing statutory royalties. See also RIAA Comments at 59-61. RIAA detailed in its initial comments how the same artist may record the same sound recording for various

albums or with various background musicians and vocalists. <u>Id</u>. In those instances, different copyright owners and performers may be entitled to royalties for the public performance of those recordings. In Exhibit P attached hereto, RIAA provides examples where reporting only the Artist Name and the Sound Recording Title would not permit the correct identification of the copyright owner or performers entitled to royalties for the public performance of a sound recording by that artist.<sup>50</sup>

The first two pages of Exhibit P are intended to simulate what a report of use might look like if a service reported only Artist Name and Sound Recording Title for the performance of a given sound recording under statutory license. If this minimal reporting were permitted, then a collecting entity would not necessarily be able to identify the copyright owners or performers entitled to royalties for those performances. This is because for the entries listed on the first two pages of Exhibit P, there are at least two different versions of that same sound recording by the same artist on different albums with different rights owners. Those multiple recordings of the same sound recording by the same artist are identified on pages 3-6 of Exhibit P, along with the album title and label name for those recordings. As this Exhibit shows, multiple copyright owners may have rights to identically titled sound recordings by the same artist.

<sup>&</sup>lt;sup>50</sup> The examples included in this Section IV.A are for illustrative purposes only and should not be interpreted as a comprehensive listing of those situations where the reporting of the identified information would create uncertainty for royalty distribution purposes.

<sup>&</sup>lt;sup>51</sup> The column heading "Label" is used in Exhibit P and Exhibit T because RIAA, in developing a sample report of use without the benefit of access to physical product, was not able to determine from its own research whether the listed record company is the "Marketing Label" or the "Track Label (P)-Line" copyright owner. Such a determination generally requires access to the physical product, which the services would have.

For example, on page 1 of Exhibit P, the featured performer Alice Cooper is listed as having recorded a song titled "I'm 18." If a collecting entity were to receive a report of use that contained only that information, the collecting entity would not know whether the service performed the version of "I'm 18" from the album "Classicks" or "Love It To Death." See Exhibit P-3. This information is critical for a collecting entity because different copyright owners may be entitled to royalties depending upon the source album for that sound recording. In this instance, Warner is the Marketing Label and/or Track Label (P)-Line for the album "Love It To Death" while Epic (a Sony label) is the Marketing Label and/or Track Label (P)-Line for the album "Classicks." If services are permitted to exclude the Album Title from a report of use, then collecting entities will not know how to distribute royalties in the instances where multiple copyright owners may have rights to identically titled sound recordings by the same artist.

An additional problem that could occur if services only report Artist Name and Sound Recording Title is the situation where the members of a band (i.e., featured artist) change over time (or different nonfeatured performers appear on studio releases versus live recordings), but the reconstituted band continues to release albums, including new recordings of prior releases. Without specific information on each individual sound recording, a collecting entity would have to guess which version of the sound recording the service performed in order to pay royalties to the correct members of the band.

The first two pages of Exhibit Q attached hereto list instances where a band has recorded a specific sound recording. The Album Title is not identified. From its own limited research, however, RIAA knows that the bands identified on the first two pages of Exhibit Q recorded the identified sound recording on more than one occasion and with

different members of the band. Therefore, if a collecting entity were to receive only

Artist Name and Sound Recording Title on a report of use, there would be no way to

determine the band members entitled to statutory royalties for the performance of the

listed sound recordings. On pages 3-6 of Exhibit Q, however, where Album Title is

provided, a collecting entity would have additional information that would be critical for

distinguishing among different versions of the same sound recording so that principal

members of a band could receive their share of statutory royalties.

For example, on page 3 of Exhibit Q, the band "Black Sabbath" is listed as having recorded the sound recording "Black Sabbath" for two different albums: "Live Evil" and "Black Sabbath." The composition of the band Black Sabbath, however, was not the same for these two recordings. For the version of "Black Sabbath" on the album "Black Sabbath," released in 1970, the members of the band Black Sabbath were Ozzy Osbourne, Geezer Butler, Tony Iommi, Bill Ward, Ira Ferguson, Michael Howse and Bill Russell. Twelve years later, when the song "Black Sabbath" was released on the album "Live Evil," the members of the band Black Sabbath were Vinny Appice, Geezer Butler, Ronnie James Dio, Tony Iommi, Geoff Nichols, Ira Ferguson, Michael Howse and Bill Russell. See Exhibit R, page 2 of 3 "Credits" for Album "Black Sabbath" and page 2 of 3 "Credits" for Album "Black Sabbath" and page 2 of 3 "Credits" for Album "Live Evil") (printouts from AMG All Music Guide, www.allmusic.com).

A more striking example of the problems that arise when band members change over time and the band releases multiple versions of the same sound recording is the situation with the "Grateful Dead." The Grateful Dead released numerous studio albums and live albums, and continues to release "new" recordings from its vault of concert

tapes. But as the members of the Grateful Dead changed over the years (principally the keyboard player), identifying the members entitled to statutory royalties for the performance of a given sound recording is particularly difficult if the same titled sound recording appears on numerous albums. Exhibit S attached hereto includes four sections identifying the significant issues involved in identifying the members of the Grateful Dead. Tabs 1 and 2 of Exhibit S identify the band members for each of the Grateful Dead's studio and live albums, respectively. Each distinct composition of the band is noted with a letter. For example, for the album "The Grateful Dead," the members of the Grateful Dead were identified as Jerry Garcia, Bob Weir, Phil Lesh, Bill Kreutzmann and Ron McKernan (aka "Pigpen"). This composition of the Grateful Dead has been given the designation "A." On the album "Anthem Of The Sun," however, the members of the band were Jerry Garcia, Bob Weir, Phil Lesh, Bill Kreutzmann, Mickey Hart, Ron McKernan and Tom Constanten, and this composition of the band has been given the designation "B."

Tabs 3 and 4 identify the sound recordings released by the Grateful Dead and the albums on which they appear, with Tab 3 being studio releases and Tab 4 live releases. As one can see from a quick review of these two tabs, the band has released the same sound recordings on multiple albums. In the far right column in Tabs 3 and 4, the configuration of the band is noted with the letter designations from Tabs 1 (studio recordings) and 2 (live recordings). For example, the song "Beat It On Down The Line" appears on six live albums but there were four different "versions" of the Grateful Dead for those six albums, including the compositions designated as "C" (Jerry Garcia, Bob Weir, Phil Lesh, Bill Kreutzmann, Mickey Hart, Ron McKernan (Pigpen)) and "G" (Jerry

Garcia, Bob Weir, Phil Lesh, Bill Kreutzmann, Donna Jean Godchaux, Keith Godchaux). If services did not report album information, then there would be no way for a collecting entity to identify the specific band members entitled to statutory royalties.<sup>52</sup>

While some bands have management companies that handle the collection and distribution of royalties for all individuals who may have been members of the band, that is not always the case. Moreover, even if the management company is willing to collect the royalties for all of the members, the company will need the information regarding the version of the sound recording for which the royalties were collected so that it can divide the money accordingly. Therefore, the reports of use by services must permit collecting entities or managers to distinguish among the various incarnations of the band so that the proper members may receive distributions of statutory royalties.

An additional problem with providing solely Artist Name and Sound Recording

Title is differentiating between two artists with the same name. Although not necessarily

common, this situation does occur, and a collecting entity will need further information in

order to distribute royalties to the copyright owners and performers entitled to royalties

for the performance of a sound recording where the identity of the featured artist based

upon a shared Artist Name is indeterminate. Attached as Exhibit T hereto is a list of

some featured artists (individuals and groups) that have identical or substantially similar

names. For example, "Al Jones" is the name shared by two featured artists. If a

collecting entity were to receive a report of use that provided only the Artist Name "Al

<sup>&</sup>lt;sup>52</sup> Fleetwood Mac is another band that released the same titled sound recordings on multiple albums. The band also had numerous configurations over time. Tab 5 of Exhibit S identifies the different configurations of Fleetwood Mac and Tab 6 provides the band's discography, indicating the different band members entitled to statutory royalties depending upon the source album from which a particular song is played.

Jones" and the title of a sound recording, then the collecting entity would not necessarily know which "Al Jones" was entitled to statutory royalties.

As the examples in Exhibits P, Q, R, S and T attached hereto indicate, the proposal to provide just Artist Name and Sound Recording Title would not provide a collecting entity with sufficient information for distinguishing among different versions of the same titled sound recording by the same artist. Consequently, merely providing Artist Name and Sound Recording Title to copyright owners or their collecting entities does not satisfy the services' statutory requirement to provide copyright owners with "reasonable notice of use of their sound recordings," and the Copyright Office should reject any such proposal.

2. The Proposals To Report Only Artist Name, Sound Recording Title and Album Title On Reports Of Use Would Not Permit The Accurate Distribution Of Statutory Royalties To Copyright Owners And Performers.

To the extent services propose reporting only Artist Name, Sound Recording Title and Album Title on a notice of use, <sup>53</sup> RIAA contends that such information will not provide collecting entities with sufficient information for the proper distribution of statutory royalties and, therefore, does not constitute reasonable notice of use. For the same reasons identified in Section IV.A.1 above, this limited information would not permit a collecting entity to identify the copyright owners entitled to royalties for the public performance of sound recordings without reference to additional resources.

<sup>&</sup>lt;sup>53</sup> <u>See</u> SDARS Comments at 24-25 ("The following information . . . would allow RIAA to determine the Services' sound recording usage and accurately to distribute royalties: (i) name of the Service or entity; (ii) sound recording title; (iii) artist; and (iv) retail album title, where available.").

Merely knowing the Artist Name, Sound Recording Title and Album Title does not identify for the collecting entity the copyright owner entitled to statutory royalties for the performance of that sound recording. For example, if a collecting entity receives a report of use listing Alice Cooper performing "I'm 18" on the album "A Fist Full Of Alice," the collecting entity still needs to research that recording to determine that Warner is the record label entitled to royalties for the performance of that sound recording. Because the services will have this information in their possession, they should be required to report this information on a report of use; copyright owners and performers should not have to expend time and money researching information that is in the possession of the services and critical for the distribution of statutory royalties.

3. The Proposals To Exclude Track Label (P)-Line Information From Reports Of Use Would Not Permit The Accurate Distribution Of Statutory Royalties To Copyright Owners And Performers.

Numerous parties have filed comments objecting to the proposal to require the reporting of Track Label (P)-Line information. These parties have complained that such information is redundant and unnecessary for identifying sound recordings, not available or unduly burdensome. See, e.g., SDARS Comments at 34 (this information "is merely another means of identifying the sound recording and, as such, is duplicative of the title, artist, and album and record label information that the Preexisting Satellite Services have proposed to provide."); Radio Broadcasters' Comments at 53 ("[T]his information is merely another means of identifying the sound recording and, as such, is duplicative of the Broadcasters' proposal to provide title, artist, and album information."); CPI Interactive Comments of March 8, 2002 at 2 (unavailable); Music Choice Comments at 7 (unnecessary); Ultimate-80s Comments at 2 (extremely difficult, cost prohibitive, and/or

simply impossible to attain). If services are going to criticize the proposal to require the reporting of Track Label (P)-Line information, they should also show how copyright owners are to receive reasonable notice of the use of their sound recordings when the service performs a sound recording from a compilation album and fails to identify the sound recording copyright owner.

The entity listed on the Track Label (P)-Line is generally the sound recording copyright owner and entity entitled to royalties for the digital audio transmission of the sound recording. See RIAA Comments at 57 & 60. Requiring reporting of the Marketing Label instead of the Track Label (P)-Line on a report of use, therefore, will not provide a collecting entity with sufficient information for the proper distribution of statutory royalties, as the Marketing Label may be distinct from the Track Label (P)-Line.

Tab 1 of Exhibit U provides examples of sound recordings by different featured artists on different album releases. The Marketing Label is also provided on these pages. But if a collecting entity were to distribute royalties for the performance of any of these sound recordings to the identified Marketing Label it would likely allocate statutory royalties improperly. That is because, as evidenced in Tab 2 of Exhibit U, the Track Label (P)-Line copyright owner may be different from the Marketing Label on a compilation recording. For example, for the compilation album "Now That's What I Call Music 8," there are 20 sound recordings by 20 different artists. Virgin America Records, Inc. is listed as the Marketing Label. See Exhibit U, Tab 1-4. The Track Label (P)-Line copyright owners for those 20 sound recordings, however, include, inter alia,

<sup>&</sup>lt;sup>54</sup> Even the Radio Broadcasters acknowledge that "[d]ifferent owners may own the rights in different tracks from the same CD." Radio Broadcasters' Comments at 18.

Sony Music Entertainment Inc., Zomba Recording Corp., Virgin Records American, Inc., The Island Def Jam Music Group, Blackground Records, LLC, Arista Records, Inc., EMI Records Ltd., Wall of Sound Recordings and Universal Records. <u>Id.</u>, Tab 2-5 & 6. In each instance where the version of a sound recording from this album is performed under a statutory license, the statutory royalties are to be distributed to the Track Label (P)-Line copyright owner (which may or may not be the same copyright owner of the initial release of that sound recording) and not to the Marketing Label (unless they are the same).

To reduce the likelihood of the misallocation of statutory royalties, the Copyright Office should require services to report both Track Label (P)-Line information and Marketing Label. If such information is not reported, then it is likely that collecting entities will not distribute royalties to the parties entitled to receive such royalties. If the misallocation of statutory royalties is likely in the absence of Track Label (P)-Line information, then any proposal to exclude the reporting of such information is not reasonable and, therefore, should be rejected by the Copyright Office.

4. The Proposals To Exclude Genre Information From Reports
Of Use Would Likely Increase Administration Costs And
Reduce Royalties Distributed To Copyright Owners And
Performers.

Requiring services to report Track Label (P)-Line information (in addition to Artist Name, Sound Recording Title, Album Title and Marketing Label), however, does not ensure the proper allocation of statutory royalties. This is because there are many instances where labels share identical or substantially similar names, and identifying which label is entitled to statutory royalties is often difficult without additional information. See RIAA Comments at 51 and Exhibit V. For this reason, RIAA has

proposed requiring services to report a field titled "Genre," which would not be an objective designation but rather the subjective classification given by a service to a particular channel of music.<sup>55</sup> The provision of this information will frequently provide distinguishing data between two identically or similarly titled entities, and this information is readily available to the services and not difficult to provide.

Several commenting parties have stated that RIAA's request for the identification of the musical genre for a channel or program is not necessary for royalty collection and distribution and is simply a "fishing expedition" for marketing data. <u>See</u> Radio Broadcasters' Comments at 54<sup>56</sup>; SDARS Comments at 35.<sup>57</sup> As noted above, however, the request for Genre designation was made to facilitate the proper distribution of royalties when two entities share the same name but own separate repertoire. The services do not address in their comments how a collecting entity would distribute

Radio Broadcasters Comments at 54.

SDARS Comments at 35.

<sup>&</sup>lt;sup>55</sup> The Genre designation is requested on a per channel basis and not on a per sound recording basis. However, if a service's business practice already incorporated Genre designation on a sound recording basis, such information would be preferable.

<sup>&</sup>lt;sup>56</sup> Radio Broadcasters characterized the request for Genre information as follows:

RIAA's quest for station format information is an improper fishing expedition for information that receiving and designated agents plainly do not need. A station's format has no relevance to fee collection or distribution. The more likely explanation for RIAA's attempt to obtain this information is to collect useful marketing information (i.e., determine sound recordings with "cross-over" appeal) in order to target more accurately its promotional efforts and perhaps even program competing webcasting channels.

<sup>&</sup>lt;sup>57</sup> The satellite digital audio radio services characterized RIAA's request for Genre information as follows:

Genre information has very little, if any, relevance to ascertaining sound recording usage or to identifying sound recordings that are used. For example, is Stairway to Heaven an "oldie," "classic rock," "heavy metal," "rock," "hard rock," "album oriented rock?" The more likely explanation for RIAA's attempt to obtain genre information is to obtain useful marketing information (i.e., to determine sound recordings with "cross-over" appeal) . . ."

royalties to the entitled copyright owners in such circumstances. In Exhibit V, RIAA has identified a number of instances where two or more labels share an identical or similar name. Where a service reports one of these entities as either the Marketing Label and/or Track Label (P)-Line for a sound recording, the collecting entity will not know which entity is entitled to the distribution of statutory royalties without further information. Finding this information may require extensive research or calls to the various labels, efforts that take time and money and reduce the distributions available for copyright owners and performers. However, if the services are required to report their own station format designation (i.e., how they market or define their station for listeners) – a task that cannot be deemed burdensome – then collecting entities would be aided in their efforts to pay royalties only to those entities entitled to statutory royalties.

For example, on the first page of Exhibit V, the labels "Aim Records" and "Aim Records" are listed. The first "Aim Records" is located in Baltimore, Maryland and the second is located in Belgium. Each of these companies owns copyrights to different sound recordings. Therefore, if a service were to report a performance of a sound recording with the Marketing Label or Track Label (P)-Line filled in as "Aim Records," the collecting entity would not know which entity with that name is entitled to statutory royalties. However, if the service were to provide a designation for its channel of programming as "Classical Indian, Pop or Spiritual" (Aim Records US) or "Electronic" (Aim Records Belgium) (or some close approximation thereto), a collecting entity's efforts to distinguish between these two companies would be simplified.

5. The Proposals To Exclude ISRC, Catalog Number, UPC And Release Year On Reports Of Use Will Impede The Distribution Of Statutory Royalties To Copyright Owners And Performers And Drive Up The Costs Of Distribution.

Many services have objected to the proposal to require the reporting of ISRC, Catalog Number, UPC and Release Year. As noted in RIAA's Comments, however, such information enables a copyright owner to distinguish among different versions of sound recordings by the same artist. See RIAA Comments at 56-60. This information is particularly important in those limited instances where services are unable to report an Album Title, such as on a promotional single where the album title may not be provided or, as happens more frequently, where services report the Artist Name as "Various." These additional data elements may also help distinguish between similarly named labels where the Genre designation does not clarify any ambiguity. See Exhibit V, Angel Records (overlapping Genres). If the collecting entity has the Release Year along with Catalog Number, ISRC or the UPC number for a sound recording where the artist is reported as "Various" or in instances where two or more labels share the same or similar names, then it may be able to identify the copyright owner of the recording entitled to statutory royalties. Such information is also valuable when services report performances of classical music using the name of the composer as the Artist Name and/or the Album Title, and the only way to determine the identity of the entities entitled to statutory royalties for such performances may be through the ISRC, Catalog Number, UPC and Release Year.

The Catalog Number, UPC and ISRC are also common identifiers that may facilitate the efficient distribution of royalties as such identifiers permit collecting entities and services to utilize multiple databases containing varying degrees of information on

sound recordings, including both proprietary and commercially available databases. By using a common identifier, there will be instances where identifying the copyright owners and performers for particular recordings will be facilitated. Contrary to the suspicions of some of the commenting parties in this proceeding (see, e.g., DiMA Comments at 2; 58 Robinson Comments at 2<sup>59</sup>), however, there is no existing database of which RIAA is aware that contains information on every sound recording released in the United States. RLI is also not aware of any such database. See RLI Comments at 3 n.2. As noted in Section III.B.3 supra, the absence of a current database for all sound recordings lawfully released in the United States does not preclude the development of multiple, comprehensive databases by enterprises seeking to provide solutions to statutory licensees. In fact, such development will likely follow the promulgation of final reporting requirements by the Copyright Office.

B. Each Service Should Be Required To Provide The Requisite Information For All (And Not Merely A Sample) Of The Sound Recording Performances That It Makes.

Broadcasters wish to provide information for only a "small sample" of their sound recording performances, rather than for all of their performances. ARBA Comments at 3; see also Radio Broadcasters' Comments at 35-40. For example, the Radio Broadcasters

<sup>&</sup>lt;sup>58</sup> DiMA hypothesizes "that it would be most efficient and least burdensome for the designated agent to give the services access to its comprehensive database of sound recordings, rather than requiring each service to develop its own database." DiMA Comments at 2.

<sup>&</sup>lt;sup>59</sup> Not only does Mr. Robinson want access to a nonexistent database, he wants such access for no more than a nominal fee and with periodic updates: "I also ask [the Copyright Office] to require that all Collectives provide to webcasters (for no more than a nominal duplication fee) a database with the necessary reporting information for all material cleared through the collective. This requirement should include incremental updates to the database that are also available at nominal cost to webcasters (either by mail subscription, email subscription, or internet download)." Robinson Comments at 2. As noted previously, such efforts to appropriate the private property of the collecting entities for the benefit of other private parties should be rejected immediately by the Copyright Office as an improper proposal for a taking in violation of the 5th Amendment to the United States Constitution.

say they should report only those performances made during "four or five weeks per year." Radio Broadcasters' Comments at 35-36. ARBA says that "data could be collected for all performances on one day per month, or one week per calendar quarter, or per a similar formula." ARBA Comments at 3. None of the arguments advanced by the broadcasters supports reversal of the Copyright Office's conclusion that census, as opposed to sample, reporting is both necessary and appropriate. See Original Determination, 63 Fed. Reg. 34294 (requiring preexisting subscription services to provide monthly "Intended Playlists" that consist of "a consecutive listing of every sound recording scheduled to be performed, for each of the Service's channels and each day during the reported month"); proposed Section 201.36(e)(2) (extending that requirement to all services that make transmissions pursuant to Section 114(d)(2)). 60

To support their proposal for sampling the Radio Broadcasters also erroneously assert that RIAA acceded to sampling in the Original Determination. See Radio Broadcasters Comment at 36-37. This is simply not true. In that proceeding, RIAA proposed as a compromise that services provide intended, summary frequency data (all the data elements except for the date and time each sound recording was performed) so long as the services also provided information on the average amount of time the services overscheduled sound recordings (by channel and period) and a report showing actual performance data for a one-third (30-day) sample period per quarter chosen at random by RIAA (i.e., all the data plus the start date and time of the sound recording's

<sup>&</sup>lt;sup>60</sup> In this proceeding, RIAA has proposed that services file a Uniform Report of Performances that sets forth the sound recordings performed and the total number of performances, among other things, rather than the "Intended Playlists" required in the subscription services proceeding. <u>See</u> RIAA Comments, Exhibit A, § 201.35(e)(1). The Uniform Report of Performances subsumes the information contained in the Intended Playlists.

transmission). The one-third sample data would be used: (1) to verify accuracy of the "summary frequency data" (i.e., to permit RIAA to confirm quarterly performance data by extrapolation from the 30-day sample); and (2) to monitor compliance with the sound recording performance complement.

At no point were the services permitted to use a sample to calculate the number of performances. They were merely offered the option of reporting the performances of each sound recording in totals for the reporting period if they provided the requested sample census data. Indeed, the services ultimately declined the offer to provide samples, concluding that providing the census data was more efficient. See Interim Regulations on Notice and Recordkeeping for Digital Subscription Transmissions (full text version) at 11 (June 22, 1998).

# 1. There Is A Compelling Need For Performance Reports Based On Census, Rather Than Sample, Data.

To be eligible for the Section 112 and Section 114 statutory licenses, broadcasters and other services must provide sound recording copyright owners with "reasonable notice of use of their sound recordings." 17 U.S.C. §§ 112(e)(4), 114(f)(4)(A). Reports based on sample rather than census data do not afford such notice because they fail to inform individual copyright owners and performers – particularly those whose copyrighted recordings are transmitted less frequently than others – of instances where their recordings are being used by services that avail themselves of the statutory licenses. Reliance upon census reporting is the only way to ensure that the copyright owners and performers receive the statutorily-required notice of use of their recordings.

Furthermore, there is no question that a survey drawn from a large universe of sound recording performances will omit recordings as well as performances from the

survey. The infrequently transmitted sound recording, that may nevertheless be received by (and thus performed for) scores, hundreds or even thousands of listeners, can be passed over during a survey, with zero compensation flowing to the copyright owners and artists entitled to royalties for such performances. These copyright owners and artists will be denied their rightful share of compulsory licensing royalties as a result of omission from the survey sample. And if they have no other recordings captured in the survey, they will be denied compensation altogether. Royalties that should go to one copyright owner or performer will instead go to another – a result contrary to Congressional intent that all copyright owners and performers should receive royalties based on the usage of their recordings. See 17 U.S.C. §114(f)(2)(B) (requiring CARP to set royalty rates based on, among other criteria, the "quantity and nature of the use of sound recordings"). 61

Indeed, one of the most damaging aspects of relying upon surveys to allocate royalties is the confusion it causes for the collecting entities and its members or principals. It is difficult to explain to individual copyright owners and performers that they will receive no royalties for certain performances of their recordings — just as it is difficult to justify according a zero royalty share to any particular claimant in a compulsory licensing royalty allocation proceeding. See National Ass'n of Broadcasters

<sup>61</sup> The Future of Music Coalition ("FMC"), a "not-for-profit collaboration between members of the music, technology, public policy and intellectual property law communities" (FMC Comments at 1), expresses a similar concern. FMC asks the Copyright Office to require "hobbyist webcasters, community broadcasters and non-commercial college radio stations" to report "their 'playlists' so that lesser known recording artists and small independent recording labels are properly credited with their share of digital performance royalties for sound recordings. If reporting was limited to commercial webcasters, there is a danger that royalties that should be allocated to less well known recording artists and record labels may in fact be paid to their larger and better financed colleagues." Id. at 2. FMC's concerns about hobbyist webcasters, community broadcasters and non-commercial college radio stations apply as well to many larger commercial webcasters who offer tens or even hundreds of highly specific genre channels.

v. CRT, 675 F.2d 367 (D.C. Cir. 1982) (discussing challenge by NAB of CRT's failure to award any cable royalties to commercial radio broadcasters) & Distribution of 1993, 1994, 1995, 1996 and 1997 Cable Royalty Funds, 66 Fed. Reg. 66433, 66448 (Dec. 26, 2001) (concluding that a survey sample methodology generally used to determine relative value of a broad range of programming was flawed when used to determine relative value of an individual television program). Those copyright owners and performers find it equally difficult to accept that they can be denied compensation for particular performances of their recordings simply because services – that voluntarily choose to avail themselves of the privilege of compulsory licensing - do not wish to take the time to report all the performances they make. The problem would be particularly acute for artist-owned labels, where the copyright owner/artist is entitled to 95% of the statutory royalties. Where a survey misses performances by artists who are also the copyright owners of their own recordings, the loss in statutory royalties could deprive the artist/copyright owner of a substantial source of revenue. The costs of resolving the inevitable disputes resulting from Copyright Office-mandated sampling would ultimately (and unfairly) reduce the already minimal fees that all copyright owners and performers receive under Sections 112 and 114.

### 2. There Is No Record Basis For Choosing Any Reporting Procedure Based On Sample, Rather Than Census, Data.

In seeking to provide only sample data, the services necessarily suggest that the performances and copies they make during some limited period of time are representative of the performances and copies that they make during the entire reporting period. ARBA in effect claims that, for example, if one sound recording accounts for 2% of the total performances during a single day, it will account for 2% of the total performances during

the entire month; and if another recording was not received by any listeners on the sample day, then that recording was not received by any listeners during the entire month.

See ARBA Comments at 3. The Radio Broadcasters make essentially the same claim, except they suggest that the identity and frequency of performances and copies during a four- or five-week period are representative of the identity and frequency of performances and copies during the entire year. See Radio Broadcasters' Comments at 39.

Neither the Radio Broadcasters nor any of the other parties who advocate sampling (and who have the data under their control) offer record evidence that the above claims are in fact accurate. There certainly is nothing in the record to support the adequacy of the sampling procedure recommended by the Radio Broadcasters versus the sampling procedure recommended by ARBA versus any other particular sampling procedure. These parties have simply failed to provide the Office with any record basis for adopting any type of sampling methodology as a replacement for the type of census reports subscription services are already providing. 62

# 3. All Services, Broadcasters and Internet-Only Webcasters Alike, Should Be Required To Provide Census Reports.

As noted above, several services oppose detailed reporting requirements because of the large size of their libraries of sound recordings. <u>See Section II.A.2 supra</u>. The fact that the services rely upon such large libraries illustrates that a wide variety of recordings

<sup>&</sup>lt;sup>62</sup> Claims that royalty payments allocated under a survey balance out in the end are also unsubstantiated. The universe here is not simply a handful of major record companies but literally hundreds of individual record companies. Moreover, even within a major record company, there is a wide variation in the degree to which individual recordings, with different artists entitled to compensation, may be performed. It is little consolation to one artist underrepresented in a sample that another artist backed by the same record company is overcompensated.

may be transmitted under the Section 114 statutory license or copied under the Section 112 license. A basic problem with sampling is that the larger and more varied the library of sound recordings, the more inaccurate is any report based on less than census data. The Radio Broadcasters appear to acknowledge as much when they suggest that RIAA's concern with sampling has greater applicability to Internet-only webcasters who typically perform a wider variety of sound recordings than most broadcasters. See Radio Broadcasters Comments at 37.

To be sure, as the Radio Broadcasters suggest, it would be particularly inappropriate to permit Internet-only webcasters to submit reports predicated on only sample rather than census data. However, there is no basis for the Copyright Office treating broadcasters any differently. Just as there are Internet-only webcasters that provide single channels of programming similar to that provided by broadcasters, there are individual broadcasters that provide a varied, eclectic mix of sound recordings that exacerbates the difficulties associated with sampling.<sup>64</sup>

<sup>&</sup>lt;sup>63</sup> Reliance on surveys is especially problematic when one seeks to use surveys from some channels of programming to determine the allocation of royalties on non-surveyed channels of programming. An example of this problem is the case of Spanish language programming. For Latino or Spanish services, there are multiple and distinguishable sub-formats, such as Cuban, Latin, Latin Jazz, Salsa and Tejano, that fail to serve as appropriate proxies for each other. Thus, using a survey of a Salsa channel to allocate royalties on a Tejano channel would not properly compensate the copyright owners and performers whose sound recordings were transmitted on the Tejano channel.

Similar problems arise in a broad range of music genres that can and are divided into distinct subgenres. Exhibit W attached hereto includes a series of screen shots from the audio player for AOL Time Warner's "Spinner" service. As this illustrates, there are distinct sub-genres for Latin, Alternative & Hard Rock, Classic Rock & Oldies, Classical and Country & Folk. Any attempt to use surveys from one of these sub-genres to allocate the royalties that are attributable to performances on other sub-genres within the same genre is likely to result in many copyright owners and performers not receiving their share of statutory royalties.

<sup>&</sup>lt;sup>64</sup> <u>See page 11 supra</u>. For example, Harvard Radio Broadcasting Company boasts that its station WHRB plays "70,000-90,000 unique sound recordings annually." Harvard Comments at 8. If one assumes that WHRB broadcasts and simulcasts music 24 hours a day and averages 12 sound recordings per hour, the station would have a total of 105,120 instances during the year in which to transmit sound recordings. If Footnote continued on following page.

4. ASCAP And BMI Practices Provide No Support For Permitting Reports Based On Sample, Rather Than Census, Data.

The broadcasters argue that they should not be required to provide

SoundExchange with census data because they supposedly do not provide census data to

ASCAP and BMI. That argument is both irrelevant and misleading.

First, ASCAP and BMI began operation decades ago in a business and technological environment that is very different from today's digital world. These factors have lead ASCAP and BMI to adopt specific practices that may be appropriate for ASCAP and BMI. That does not mean that such practices are appropriate for, or can be unilaterally imposed on, sound recording copyright owners and performers under the DMCA. Broadcasters in particular – who pay royalties to ASCAP and BMI for performances of musical works but pay nothing to sound recording copyright owners and performers for the analog performance of sound recordings – should not expect that the same rules that apply to ASCAP and BMI will apply equally when they deal with sound recording copyright owners and performers.

Second, the ASCAP and BMI reporting requirements are related to the nature of the royalty that their licensees pay. For most broadcast licensees (those that opt for so-called "blanket licensees"), the fees paid to ASCAP and BMI do not vary depending upon the amount of music that the particular licensee performs. Radio stations that take the

the station performs 70,000 unique sound recordings during the year, then 66% of the sound recordings during that year would be unique, with the remaining 33% being repeat performances. If, however, the number of unique sound recordings rose to 90,000 as WHRB maintains, then 85% of the sound recordings performed on the station during the year would be unique performances and only 15% would be repeat performances. One is left to wonder how any sample of the programming on WHRB would "reasonably" reflect the variety of programming performed and compensate the copyright owners and performers whose recordings were utilized by WHRB.

blanket license pay each PRO a set percentage of the revenues derived from each and every one of the licensee's programs, regardless of how much of that PRO's music is contained in the program or, indeed, whether the program contains any music at all.

Because blanket license fees are not tied to usage, broadcasters are not required to make detailed reports to ASCAP or BMI. As ASCAP has explained with specific reference to its television station blanket licensees:

Stations operating under the blanket license do not have to submit reports to ASCAP in order to determine their fee because the fee is not based upon actual usage.

See "ASCAP Licensing: Television FAQ," at

http://www.ascap.com/licensing/tvfaq.html (last visited Apr. 24, 2002).65

In contrast, the statutory licensing fees paid by broadcasters and other eligible nonsubscription services are based on usage, as they must be under Section 114(f)(2)(B) of the Copyright Act. These services pay a prescribed fee for each performance of each work. To ensure that that fee goes to the appropriate sound recording copyright owner and to the appropriate artists, the service must properly identify each of the performances that it makes.

<sup>&</sup>lt;sup>65</sup> ASCAP and BMI also offer so-called "per-program" licenses. Like a blanket license, a per program license permits a broadcaster to perform any musical work in the repertory of the PRO. However, the per program licensee pays a specified percentage of just those revenues attributable to programs which contain that PRO's musical works (in addition to a fee for the right to perform incidental music) – rather than a percentage of revenues attributable to all programs regardless of music content. Because a per program licensee's royalty varies somewhat depending upon music usage, that licensee's reporting requirements are more detailed. The Radio Broadcasters leave the misimpression that ASCAP licensees have the unfettered right to submit paper, rather than electronic, music reports to the PROs. Radio Broadcasters' Comments at 40. That is not true. As ASCAP explains to its television licensees: "Monthly per program reports must be submitted electronically. No paper reports are accepted." Id.

## 5. The Services Have Failed To Demonstrate That Census Reporting Imposes An Unreasonable Burden.

The broadcasters claim that census reporting will add "significant work," generate an "enormous volume of paper," and impose a "staggering burden" on radio stations.

Radio Broadcasters' Comments at 35. They also express concern for SoundExchange's workload, saying that census reporting would "bury SoundExchange in data." Id. at 36.

While the broadcasters' language is colorful, they have failed to demonstrate that the incremental work necessary to report on a census rather than a sample basis is unreasonable — or that the burdens associated with census rather than sample reporting outweigh the benefits described above.

To the contrary, in the digital medium, where services establish a direct connection with each recipient of a transmission, the service's logs record each transmission of a sound recording. See RIAA Comments at 37 & n.8. The census reporting proposed by RIAA would merely require services to make those transmission logs available to the collecting entities that collect and distribute statutory royalties. For services that do not establish connections with their listeners (i.e., those that utilize a broadcast format), the census reporting would simply require the reporting of data similar to what is currently provided by the preexisting subscription services (i.e., detailed playlist information only). The broadcasters' cries of "staggering burden" are both unsupported and contrary to fact.

C. Privacy Concerns With Respect To Listener Logs Were Based On A Misunderstanding Of RIAA's Original Request, But Are Now Irrelevant.

Nearly every party filing comments in this rulemaking has criticized the proposal to require a Listener Log. Because RIAA heard similar complaints before the deadline

for filing initial comments in this rulemaking, RIAA withdrew its support for a Listener Log in its initial comments. However, RIAA feels it is necessary to clarify the original purpose for the Listener Log.

As noted in RIAA's Comments, the Listener Log was never intended to be a mechanism for obtaining personally identifiable data on any individual user. See RIAA Comments at 33 n.7. Rather, it was intended to permit services offering broadcast-type transmissions over the Internet to provide (1) playlists of sound recordings on defined channels available to multiple listeners and (2) a log of unidentifiable users who logged into and out of any portion of the transmission of a given channel. From that material, RIAA would be able to determine the actual number of transmissions of each sound recording to unidentifiable users. RIAA was not interested in the identies of those listening to specific transmissions; it merely wanted to know that someone was receiving that transmission. This would have enabled RIAA to calculate the number of performances for each sound recording for both royalty collection and distribution purposes.

Because services have the ability to track the number of transmissions of each sound recording and to report that number on RIAA's proposed uniform report of performances, there is no longer any need for a separate log that tracks *anonymously* the number of recipients of each transmission.

# V. RIAA SUPPORTS CERTAIN ACCOMMODATIONS TO FOSTER THE PROMPT ADOPTION OF REGULATIONS AND ADDRESS CERTAIN CONCERNS.

As the Copyright Office would expect, RIAA would like to see effective notice and recordkeeping regulations adopted as soon as possible, so that royalties can be collected and distributed to record companies and recording artists at the earliest

opportunity. We recognize, however, that the Copyright Office has received a substantial number of comments in this proceeding, and we support its efforts to ensure that the legitimate concerns of all interested parties are heard. However, it is nearly 3½ years since the DMCA statutory licenses went into effect, and no royalties have been collected or disributed in that time due to the pendency of various proceedings.

In order to facilitate consensus among the parties and accelerate the implementation of regulations, RIAA hereby offers several accommodations to the proposed regulations. These suggested changes provide alternatives to the set of data fields that services include in their Reports of Use, as well as a phase-in period to aid services in compliance with regulations once they are promulgated by the Copyright Office. It must be noted that implementation of these proposals will almost certainly increase the expenses of SoundExchange and thereby reduce the royalties to be paid to copyright owners and recording artists, as they permit services to report fewer data points than previously proposed, which will make it more difficult for SoundExchange to match confidently and distribute royalties accurately. We are hopeful, however, that these alternatives will increase compliance overall and foster the prompt adoption of regulations.

#### A. Reports Of Use Should Contain Mandatory Data Fields And "Either/Or" Data Fields To Be Determined By The Service.

As noted in Section IV.A *supra*, there is certain identifying information that is absolutely required in order for royalties to be accurately distributed among copyright owners, featured artists and nonfeatured musicians and vocalists. There is other information that assists collecting entities in distributing statutory royalties, but such information may not be essential for distribution purposes if (and only if) substitute

information is provided. Following are RIAA's proposals for mandatory data fields that must be reported in all instances and substitute "either/or" fields where services have to provide one but not both data elements.

### 1. Mandatory Sound Recording Identifying Data To Be Provided On A Report Of Use.

The mandatory data fields proposed by the RIAA are those core elements that permit a collecting entity to distinguish generally among all sound recordings lawfully released to the public.

### a. Artist Name, Sound Recording Title, Track Label (P)-Line And Album Title.

RIAA requests that every service be required to report for each entry in a report of use the Artist Name, Sound Recording Title, Track Label (P)-Line and Album Title.

With this basic information, collecting entities will have the minimum information that will be needed for identifying many, but certainly not all, sound recordings lawfully released to the public.

If a service receives an advance, promotional release of a sound recording and the forthcoming Album Title is not noted, the service should still be obligated to research and eventually provide the Album Title on which the promotional release appears. As many promotional, single releases given to broadcasters are eventually followed-up with delivery of a CD PRO identifying the forthcoming album or the full-length album itself, such "research" is not at all burdensome. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 9; Tab 4, Declaration of John Dalton, ¶ 4-5; Tab, Declaration of Bruce Iglauer, ¶ 9; Tab 8, Declaration of Heather McBee, ¶ 8.

There is widespread recognition that the aforementioned data is available and should be reported. Following are some of the commenting parties that either support the

reporting of RIAA's proposed mandatory data or believe that reporting such information would not be difficult:

Data Field	Supporting Commenting Parties
Artist Name	Radio Broadcasters, Websound, Ultimate-
	80s, Beethoven.com, 3WK, XM, Sirius,
	Carl Moore, RLI, College Broadcasters,
	WOBC 91.5 FM, Oberlin College,
	RadioValve
Sound Recording Title	Websound, Ultimate-80s, Music Choice,
	Beethoven.com, XM, Sirius, Radio
	Broadcasters, RadioValve, RLI, 3WK
Track Label (P)-Line	DiMA, Websound, Carl Moore, RLI
Album Title	Beethoven.com, 3WK, Websound, XM,
	RLI, DiMA (if UPC is not given), Music
	Choice

Inasmuch as one of the requirements of the statutory license is the display of Artist Name, Sound Recording Title and Album Title during the performance of a sound recording, there is reason to question any service that claims that such information cannot be provided on a report of use. Because those three data fields, however, do not identify the copyright owner entitled to royalties for the performance of a sound recording, identifying information for the copyright owner must also be provided.

#### b. Marketing Label.

Sound recording copyright owners often market their products and account for the royalties earned from the exploitation of those products through a family of record labels (i.e., the Marketing Labels). While royalty payments are made to the copyright owner (usually indicated on the Track Label (P)-Line), record companies generally account for royalties by Marketing Label. For example, copyright owner Sony Music Entertainment, Inc. ("Sony") markets its products under many different Marketing Labels, including Epic, 550 Music and Columbia. Yet Sony reports sales and usage of those products back

to the label so they can in turn account for royalties earned. The Marketing Label field is essential to ensuring that the copyright owner can accurately account and report the royalty earnings to the label.

Because the Marketing Label is almost always identified on the product used by the services to make transmissions, it is not burdensome for those services to provide that information on a report of use. Moreover, as reporting the Marketing Label will provide copyright owners with "reasonable notice of use," the Copyright Office should require services to report this information on a report of use.

#### c. Release Year.

Services should report the Release Year where available, which will be the case in almost every instance. This information is needed for differentiating between re-releases of the same titled album where the copyright owner of the original release is not the same as the copyright owner of the re-release. In those instances, the only differentiating data element could be the Release Year.

## 2. "Either/Or" Sound Recording Identifying Data To Be Provided On A Report Of Use.

As noted above, there are categories of identifying information that, in light of the provision of other identifying information, may not be essential for effecting distributions. Therefore, in an effort to streamline reporting and increase a service's ability to comply with the regulations, RIAA proposes that each service be required to provide, at its election, the following additional information on a track-by-track basis.

#### a. ISRC Or Duration Of The Sound Recording.

Services should be required to report either the ISRC number or the Duration of the Sound Recording on a report of use, in addition to the mandatory data elements identified in Section V.A.1 supra.<sup>66</sup> As noted above, the ISRC is included in most major-label releases and can be read using commercially available software. The Duration of the Sound Recording is always available to a service and can be read from the CD, the label packaging or from the device used to perform the sound recording. This information is needed to distinguish between different versions of the same sound recording (e.g., live performances versus studio performances) and is used for the identification of nonfeatured artists and musicians.

#### b. Catalog Number Or UPC.

Services should be required to report either the Catalog Number or the UPC number for the product in which the sound recording is embedded, in addition to the mandatory data elements identified in Section V.A.1 *supra*. These product identifiers permit collecting entities to match sound recordings with external databases and research tools for confirmation of Album Title, Marketing Label and Track Label (P)-Line. As noted previously, this information is particularly useful in instances where services misreport classical sound recordings (e.g., using the composer's name instead of the orchestra's name) or report an Artist Name as "Various."

#### 3. Service Specific Data Should Be Provided In Each Instance.

The data described in Sections V.A.1 & 2 above cover only the identifying information needed for sound recordings on RIAA's proposed Uniform Report of Performances and Ephemeral Phonorecord Log. RIAA does not believe adjustments need to be made to the other data fields in those two reports.

<sup>&</sup>lt;sup>66</sup> The field for which data is omitted should be left null, and the field should be surrounded by carets followed by the field delimiter, the pipe character.

With respect to the Uniform Report of Performances, RIAA believes that services are in possession of and can easily report the Name of Statutory Service, Transmission Category, Channel or Program Name, Genre, Type of Program, Influence Indicator, Start Date and Time of the Sound Recording's Transmission and the Total Number of Performances. For the proposed Ephemeral Phonorecord Log, RIAA similarly believes that services are in possession of and should be required to report the Name of Statutory Service, Date Phonorecord Created, Date of First Transmission from Ephemeral Phonorecord, Date Phonorecord Destroyed and Total Number of Ephemeral Phonorecords Created (Ephemeral Phonorecord Log). Many of these categories will not fluctuate and can be programmed to be entered into a report automatically.

### B. RIAA Supports Providing Services With Phase-In Periods For Complying With Reporting Requirements.

Numerous commenting parties have called for a phase-in of the Copyright

Office's reporting requirements for services operating under the Section 112 and Section

114 statutory licenses. The request for a phase-in is most frequently made by eligible

nonsubscription transmission services generally and radio broadcasters in particular. See

Radio Broadcasters' Comments, Exhibit B, Statement of Brian Parsons, ¶ 45, Exhibit C,

Statement of Gregg Lindahl, ¶ 16, Exhibit G, Statement of Mary Guthrie, ¶ 17. RIAA

supports providing services with reasonable phase-in periods for complying with the

reporting requirements adopted by the Copyright Office.

In its initial comments, RIAA asked the Copyright Office to adopt final regulations as expeditiously as possible. See RIAA Comments at 62-64. While RIAA noted that all services had constructive notice since June 24, 1998, "of the types of information they would have to report" under the Section 114 statutory license, id., RIAA

recognizes that services – and their service providers and software vendors – will likely not implement recordkeeping systems prior to the adoption of final regulations.

Therefore, some reasonable accommodation should probably be made that balances the needs of collecting entities to receive specific, identifying data for royalty collection and distribution and the enforcement of statutory requirements, with the needs of services to employ systems capable of reporting information on the usage of sound recordings.

## 1. Three-Month Phase-In Period.

RIAA proposes that all services operating under the Section 112 and/or Section 114 statutory licenses (subject to the exception set forth in the next section) be given until no later than the twentieth day of the month following the three-month anniversary of the effective date of the final regulations adopted by the Copyright Office to commence providing collecting entities with the reports of use proposed by RIAA. The first report of use to be provided by a service would include data for all performances transmitted and ephemeral phonorecords made commencing on the later of October 28, 1998 or the date the service commenced the activity authorized under a statutory license. This would include both the mandatory data fields and the "either/or" data fields specified above. These services are already using sophisticated systems to deliver music and sell advertising. There is no reason why these services should not be able to provide promptly the identifying information needed for royalty collection and distribution.

## 2. Additional Time For Noncommercial Entities Not Using Automated Programming Systems.

According to the comments filed in this rulemaking, some noncommercial entities (mostly college radio stations) may not use any automated programming systems to generate their playlists and perform sound recordings. These entities are frequently the

stations that transmit some of the most eclectic music over the Internet. And as noted above, it is particularly important for these services to provide detailed reports of use because the copyright owners of and the performers on the sound recordings played by these services are frequently not heard on commercial radio. Therefore, if reports of use are not provided for these performances, many copyright owners and performers are going to be deprived of their fair compensation.

In light of this situation, RIAA proposes that noncommercial entities not using automated programming systems for the majority of their programming<sup>67</sup> be given an additional three months in which to develop systems to provide copyright owners with required Reports of Use. At that time, these services would be required to report all of the mandatory and "either/or" data as specified above.

## VI. THERE IS NO SUBSTANTIAL DISAGREEMENT CONCERNING THE SPECIFIC QUESTIONS RAISED BY THE COPYRIGHT OFFICE

In the NPRM, the Copyright Office set forth several questions for the parties to answer in their initial comments. RIAA provided its views concerning these questions at pages 17-27 of its initial comments. A review of the comments filed by other parties reveals that there is substantial agreement as to many aspects of these issues, and no substantial disagreement.<sup>68</sup> This section highlights various issues as to which there does not appear to be any substantial disagreement.

 $<sup>^{67}</sup>$  The definition of the class of services to which this additional time applies is provided in the attached proposed regulations. See Exhibit X.

<sup>&</sup>lt;sup>68</sup> Several of the parties that filed substantial comments, such as the Radio Broadcasters, Digital Media Association and XM/Sirius, did not provide specific answers to the Copyright Office's questions.

## A. Filing Of A New Notice Of Use

RIAA supports the Copyright Office's proposal to have services currently operating under the Section 114 statutory license file a new Notice of Use with current information. RIAA Comments at 17-18. The Collegiate Broadcasters and Music Choice agreed that such filings with current information would be acceptable. See Collegiate Broadcasters at 6-7; Music Choice at 3 (filing a new Notice of Use "would not be burdensome").

#### B. Use Of A Standard Form Notice Of Use And Elements Of That Notice

RIAA supports the Copyright Office's proposal to require all services to file a standard form Notice of Use and to have that form identify the statutory license(s) upon which the service relies, as well as the category of service. RIAA Comments at 18-19. Collegiate Broadcasters and Music Choice generally agree with the use of a standard form, although they suggest that it be simplified and the process for filing be electronic if possible. Collegiate Broadcaster Comments at 6; Music Choice at 3.

Music Choice, however, objects to the identification of the statutory license category on the Notice of Use, strangely asserting that this information "does not have anything to do with providing 'notice' of use to copyright owners." Music Choice at 3. However, identification of which statutory license is being relied upon is central to the proper administration of the royalties collected under that license. Each of the licenses can have different statutory conditions and payment metrics, including different minimum payments, so collecting entities must know the requested information to be able to verify whether a service's payments and operation are in accordance with the appropriate requirements. There is also no hardship whatsoever imposed on a service in providing this information, or in updating it if circumstances change.

## C. Posting Notice Of Use On The Copyright Office Website

The Copyright Office proposed to discontinue its practice of posting Notices of Use on its website, which RIAA opposes. RIAA Comments at 20. Collegiate

Broadcasters share the RIAA's concern, as they "implore the Office to retain [posting of Notices] to ensure an easily-accessible public record." Collegiate Broadcasters at 8.

Also, like the RIAA Comments, they suggest that the Copyright Office provide for electronic filing of Notices of Use to help ease the burden of making the Notices available on the website. The Copyright Office should reconsider this proposal and continue to post Notices of Use on its website.

## D. Filing Notice Of Use With Collecting Entities

RIAA strongly opposes the Copyright Office's proposal that Notices of Use be filed directly with collecting entities, for the reasons set forth in its initial Comments.

RIAA Comments at 22-25. Collegiate Broadcasters and Music Choice also oppose the Copyright Office proposal, arguing that "it would be inappropriate and ineffective to require statutory licensees to submit Notices of Use to privately-owned designated collectives rather than to the Office." Collegiate Broadcasters at 6-7; see also Music Choice at 4. In addition, RLI agrees with RIAA that requiring a collecting entity to make its records of such Notices of Use available for public inspection would be a needless administrative burden. RLI Comments at 2. This proposal should be reconsidered and rejected by the Copyright Office.

#### E. Periodic Filing of Notice of Use

RIAA supports the Copyright Office's proposal for periodic filing of Notices of Use, RIAA Comments at 25-26, and several of the commenting parties do not oppose that proposal. See, e.g., Collegiate Broadcasters Comments at 7 (noting that it will result in

"current and accurate files" in the Copyright Office); RLI Comments at 3-4 (suggesting annual filings). As RLI explained, periodic filing is necessary for collecting entities to track compliance by services. RLI Comments at 3. In addition, RLI agrees with RIAA that a new Notice of Use should be filed within 45 days of a change in the information contained in the Notice of Use. Id.

Music Choice opposes periodic filing, suggesting that Notices be filed initially – up to six months after commencing operations – and only when an amendment is necessary. Music Choice Comments at 4. As RIAA explained in its Initial Comments, this approach will not result in "current and accurate" files, as services are likely to overlook the need to file an amended notice. Moreover, there can be no justification for a six-month delay in filing a simple one-page form that secures the content at the heart of a service offering. Such delay would only inconvenience everyone concerned as copyright owners inquired how a service happened to be using sound recordings without any manifestation of a license. After an initial transitional period, a service that elects to rely upon a statutory license should have no difficulty filing its notice before doing so. A periodic filing requirement is clear and can be easily implemented by the services. The Copyright Office's proposal should be adopted.

#### F. Payment of Filing Fees

As RIAA explained in its initial comments, because the Copyright Office should continue to collect Notices of Use rather than imposing that function on collecting entities, there is no need for a filing fee to be paid to the collecting entity if that situation remains the same. RIAA Comments at 26-27. RLI agrees with RIAA that if collecting entities are required to receive Notices of Use, then a filing fee is appropriate. RLI Comments at ¶ 2.

#### VII. CONCLUSIONS

The statutory licenses created by the DMCA became effective on October 28, 1998. In the intervening 3½ years, digital music services have enjoyed the benefits that those statutory licenses provide, including access to the entire catalog of copyrighted sound recordings. In exchange for access to this license, the Copyright Act requires that those services pay the appropriate royalty and provide information about their use of sound recordings necessary to distribute those royalties accurately and fairly. To date they have been required to do neither, as proceedings to establish those rates and reporting requirements have been pending.

The time has come to put appropriate mechanisms in place so that artists and record companies - whose creative works are at the center of those services' businesses - can be paid as Congress so long ago envisioned. To that end, RIAA created SoundExchange - at considerable expense to sound recording copyright owners - and proposed reasonable regulations for notice and recordkeeping necessary to operate SoundExchange efficiently. These proposals have been modified in several respects over time to reflect some of the concerns raised by the services that will operate under them.

RIAA urges the Copyright Office to adopt notice and recordkeeping regulations as soon as possible, and has provided ample support for adoption of the proposed regulations submitted with these Reply Comments. To the extent that the services continue merely to complain about alleged burdens without offering constructive solutions, their unfounded assertions should not be permitted to limit the reporting requirements necessary for efficient and fair distribution of royalties, or to delay these proceedings any further with needless additional filings.

By creating the digital performance right, Congress sought to give recording artists and copyright owners effective copyright protection in the evolving digital arena. By promptly adopting notice and recordkeeping regulations, the Copyright Office will take an important step towards satisfying Congress' vision.

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For the reasons set forth above, RIAA respectfully requests that the Copyright Office adopt RIAA's revised, proposed regulations set forth in Exhibit X attached hereto. <sup>69</sup>

Respectfully submitted,

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

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April 26, 2002

 $<sup>^{69}</sup>$  A compare version showing the changes between the version attached hereto at Exhibit X and the version included in RIAA's initial Comments at Exhibit A is attached hereto as Exhibit Y.

## Before the UNITED STATES COPYRIGHT OFFICE LIBRARY OF CONGRESS Washington, D.C.

In the Matter of:

NOTICE AND RECORDKEEPING FOR USE OF SOUND RECORDINGS UNDER STATUTORY LICENSE

Docket No. RM 2002-1A

## COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

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# Before the UNITED STATES COPYRIGHT OFFICE LIBRARY OF CONGRESS Washington, D.C.

In the Matter of:	)	
NOTICE AND RECORDKEEPING FOR USE OF SOUND RECORDINGS UNDER STATUTORY LICENSE	)	Docket No. RM 2002-1A
STATUTORT ETCENSE		

## COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

The Recording Industry Association of America, Inc. ("RIAA"), on behalf of itself and its member companies, which create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States and on behalf of SoundExchange¹, currently an unincorporated division of the RIAA, which has a separate, overlapping roster of members that are large, medium and small recording companies, respectfully submits these comments in response to the Copyright Office's Notice of Proposed Rulemaking on "the requirements for giving copyright owners reasonable notice of the use of their works for sound recordings under statutory license and for how records of such use shall be kept and made available to

<sup>&</sup>lt;sup>1</sup> SoundExchange licenses public performances and ephemeral recordings, and collects and distributes public performance and ephemeral recording revenue for such digital media as cable, satellite and the Internet. SoundExchange's board of directors is evenly divided between representatives of copyright owners and representatives of artists and nonfeatured musicians and vocalists. The board has voted to incorporate SoundExchange as a separate legal entity so that it is no longer a division of the RIAA.

copyright owners." Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 67 Fed. Reg. 5761 (Feb. 7, 2002) (the "NPRM").

#### I. INTRODUCTION

In 1995, Congress amended the copyright laws through enactment of the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995) (the "DPRA"), granting copyright owners of sound recordings an exclusive right of public performance. Congress limited that exclusive right through the enactment of a statutory license for certain nonexempt transmissions. The statutory license enables entities making certain digital audio transmissions of sound recordings to have access to millions of sound recordings protected by U.S. copyright law merely by taking a few minutes to file one piece of paper in the Copyright Office, instead of having to negotiate individual license agreements with the thousands of sound recording copyright owners whose songs a service might want to transmit. This efficient mechanism provides a tremendous benefit to services operating under the statutory license, but it is only available to services that agree to abide by the terms of the statutory license.

In exchange for operating under the statutory licensee and enjoying the benefits of a blanket license, each statutory licensee agrees to do four things. <u>First</u>, they agree to pay the royalties that are established by the Librarian of Congress (the "<u>Librarian</u>"), including when the rate is not established until after the commencement of transmissions.

17 U.S.C. § 114(f)(4)(B). <u>Second</u>, they agree to comply with "such notice requirements as the Librarian of Congress shall prescribe by regulation." <u>Id</u>. <u>Third</u>, they agree to provide copyright owners with reasonable notice of use of their sound recordings. <u>Id</u>. § 114(f)(4)(A). <u>Fourth</u>, they agree to abide by the programming requirements, <u>id</u>.

§§ 114(d)(1)(C)(iv), 114(d)(2)(C)(i), and other terms set forth in the statute. <u>Id</u>. § 114(f)(4)(B)(i).

Copyright owners and performers did not impose the above statutory requirements. Rather, Congress adopted these requirements as a condition of operating under the statutory license or a statutory exemption. The requirements are, therefore, akin to a contractual obligation in a voluntary license. A service only receives the benefit of the statutory license or the statutory exemption if it agrees to abide by the terms of the statute. Thus, the requirement to provide detailed reports of use - the subject of this rulemaking proceeding – should come as no surprise to services. In fact, in addition to the general requirement in the statute, the Copyright Office's adoption of interim regulations for preexisting subscription services also provided statutory licensees and exempt services with notice of the types of reports of use that would be required under the Section 114 statutory license. See Notice and Recordkeeping for Digital Subscription Transmissions, Interim Regulations, 63 Fed. Reg. 34,289 (June 24, 1998) (the "Original Determination"). Much of the data in the proposed regulations is identical to that required by the Original Determination. It is reasonable to conclude, therefore, that any service operating under a statutory license or exemption after June 24, 1998, the date the Copyright Office published the Original Determination, did so with full knowledge of its likely obligation to provide similar data reporting.

The determinations made by the Copyright Office in the Original Determination provide guidance for the Copyright Office in this proceeding. The Copyright Office previously ruled that services operating under the statutory license are obligated to provide:

- Identifying information for each sound recording performed;
- A consecutive listing of every sound recording scheduled to be performed; and
- Reporting sufficient for ensuring compliance with statutory requirements, such as the sound recording performance complement.

See id. at 34,294-95. The regulations adopted through this rulemaking should be consistent with the principles set forth in the bullet points above, and provide copyright owners and performers with information that enables them to be compensated individually for the use of their works and enforce the requirements of the statutory license or the statutory exemption.

Any claim that detailed reporting requirements will destroy webcasters or any other digital audio transmission service is unfounded. After the Copyright Office's Original Determination for preexisting subscription services, the "burden" of providing detailed reports of use did not thwart, hinder or cripple the development of such services. In fact, such services have continued to succeed since the Original Determination. Thus, history rather than hysteria should serve as a guide to the Copyright Office in this proceeding.

RIAA sets forth in these comments proposed regulations that build upon, but are slightly different than, the regulations proposed by the Copyright Office. See Section IV infra. RIAA believes that these alternative regulations will simplify the reporting obligations of services and provide collecting entities with the information needed to distribute royalties to copyright owners and performers and provide copyright owners with sufficient information to enforce the requirements set forth in Section 112 and Section 114 of the copyright laws.

## II. DETAILED REPORTS OF USE ARE NECESSARY FOR ROYALTY COLLECTION AND DISTRIBUTION AND ENFORCEMENT OF STATUTORY REQUIREMENTS

Detailed reports of use are necessary for the collection and distribution of statutory royalties and the enforcement of certain statutory requirements, such as the sound recording performance complement, which applies equally to statutory licensees and certain statutorily exempt services. Without detailed reports of use, copyright owners and performers will not be compensated for the actual use of their creative works, and services' compliance with statutory requirements such as the sound recording performance complement will be "discretionary" as services will know that without data to test for compliance, there will be little risk of their being held liable for noncompliance. In order to prevent such injustices, the Copyright Office should adopt regulations that protect the rights of copyright owners and performers.

## A. The Copyright Office Has Previously Ruled That "Reasonable Notice Of The Use Of Their Sound Recordings" Requires Detailed Reports Of Use

Each type of service operating under Section 114 is required to provide copyright owners with "reasonable notice of the use of their sound recordings." 17 U.S.C. § 114(f)(4)(A). The Copyright Office has already determined that detailed reports of use are necessary for the proper allocation of royalties among copyright owners. See Original Determination, 63 Fed. Reg. 34,289. The Copyright Office also determined that "reasonable notice" includes information sufficient for ensuring compliance with certain requirements of the Section 114 statutory license, including the sound recording performance complement. See discussion infra Section II.D. As the Copyright Office noted:

[C]onforming to the performance complement is a condition of the statutory license, and a Service that complies with the regulatory notice requirements and pays the statutory royalties thereby avoids infringing the copyright owners' exclusive rights. 17 U.S.C. § 114(d)(2), (f)(5)... The Office believes that the presence and specificity of the performance complement indicates Congress' intent that records of use include data to test compliance.

Original Determination, 63 Fed. Reg. at 34,294. In order to test for compliance with the sound recording performance complement, however, notice of all transmissions is needed. Samples or surveys of occasional transmissions on certain channels are insufficient, and would not provide copyright owners with information needed to test compliance on all channels at times selected by the copyright owner.

This rulemaking should build on the Original Determination (which the preexisting subscription services have generally complied with), correct inadequacies in the current reports of use and create a uniform reporting structure that applies to all services, regardless of the types of transmissions made. What this rulemaking should not provide, however, is an opportunity for services to argue that the sound recording performance complement has no meaning, that copyright owners are not entitled to comprehensive data that would enable them to ensure compliance with the sound recording performance complement or that the obligation to provide data collection and reporting should be borne by copyright owners and performers.

The services that participated in the matter of the Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1 & 2 (the "Webcaster CARP") are on record proposing that copyright owners should be responsible for tracking a service's usage of sound recordings. In their direct case submission, the broadcasters and webcasters in the Webcaster CARP proposed the following:

- 3. Information Regarding Use of Sound Recordings Under Statutory License
  - (a) It shall be the responsibility of any agent(s) designated to receive royalty payments under the statutory license to determine what sound recordings have been performed by services licensed under the statutory license to the extent such information is needed by the agent to fulfill its distribution obligations.
  - (b) In the event any designated agent wishes a service licensed under the statutory license to provide it with reasonable information regarding the sound recordings performed by the service, the agent shall reimburse the reasonable costs and expenses incurred by the service in collecting and providing the relevant information. In no event shall such information exceed that which is necessary to allow the agent to identify the applicable sound recordings.

Direct Case of Broadcasters and Webcasters in Webcaster CARP, Exhibit 3,

Broadcasters/Webcasters Proposed Rates and Terms for Royalty Fees for the Digital

Public Performance and Ephemeral Recording of Sound Recordings by Eligible

Nonsubscription Transmissions (Apr. 11, 2001).

This proposal by the services participating in the Webcaster CARP should be rejected. First, the services seek to shift the burden of determining what sound recordings have been performed when it is the services who control the programming of performances. In addition, as transmissions are frequently made on "channels" that are created "on the fly" and made available only to the recipient of the transmission, it would be impossible for copyright owners to "determine what sound recordings have been performed" under such circumstances. Second, the Copyright Office has already ruled in the Original Determination that certain information is needed from a service in order for an agent to distribute statutory royalties. Third, services are required to provide

<sup>&</sup>lt;sup>2</sup> <u>See</u> Quote of Brad Porteus, Vice President, MTViRadio, MTVi Group, LLC in Section IV.D *infra* regarding the creation of unique playlists for each listener.

notice of use without reimbursement of costs because providing notice of use is a requirement of the license, not an option. Notwithstanding the many creative attempts of certain services to shift their obligation to comply with the statutory requirements to copyright owners and performers, neither the Copyright Office nor those entitled to royalties should be required to expend precious time and money in this rulemaking revisiting issues that the Copyright Office decided nearly four years ago, after an in-depth rulemaking proceeding.

## B. Detailed Reports Of Use Are Necessary For Royalty Collection And Distribution

In order to fulfill the purpose of the statutory licenses – to compensate copyright owners and artists for the exploitation or reproduction of their works – one needs to identify the sound recordings actually performed or reproduced so that royalties are distributed to the copyright owners and artists entitled to receive such royalties. All of this information on performances or reproductions is in the control of the services. It is the service that programs the recordings that are performed. It is the service that obtains the recordings, "rips" those recordings to make reproductions for a database from which transmissions are made and enters the meta data for those sound recordings so that they are identifiable in the database. Indeed, many services often emphasize that they display information on specific sound recordings and links to retail websites so that listeners may purchase the transmitted sound recordings. Under the statute, some services are also required to "identif[y] in textual data the sound recording during . . . the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist, in a manner to

permit it to be displayed to the transmission recipient . . . ." 17 U.S.C. § 114(d)(2)(C)(ix).

In contrast, copyright owners and performers do not control any aspect of the public performance or reproduction of a sound recording and it would be unreasonable (and in many instances impossible) to require them to track, monitor, or collect data on the usage of their sound recordings by any service that may choose to operate under a statutory license. Therefore, the obligation to provide detailed reports of use that are necessary for royalty collection and distribution must be borne by the service exploiting the sound recording, an approach that is consistent with the Copyright Office's findings in the Original Determination.

## 1. Royalty Collection

In the Report of the Copyright Arbitration Royalty Panel in Docket No. 2000-9 CARP DTRA 1 & 2 (Feb. 20, 2002) (the "CARP Report"), the arbitrators established a rate structure that requires eligible nonsubscription transmission services to pay a statutory royalty for each "performance" of a sound recording. The CARP defined a "performance" as "each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one listener)." CARP Report, Appendix B, Rates and Terms for Eligible Nonsubscription Transmissions and the Making of Ephemeral Reproductions at § 1(1) (hereinafter "CARP Report, Appendix B").

Under the Webcaster CARP decision, eligible nonsubscription transmission services must report to the collecting entities for copyright owners and performers the actual number of performances during a given month. If a service plays one song on a channel that is received by 10 people, then the service must pay royalties for 10

performances. Similarly, if a service plays all or part of 10 songs on a channel received by one listener, then the service must pay for 10 performances. Each eligible nonsubscription transmission service must, therefore, provide copyright owners or collecting entities with statements of account that contain information that is sufficient to calculate the number of compensable performances that have been transmitted under the Section 114 statutory license. This includes information on the number of transmissions on each channel of programming offered by the service during each hour of each month.

The arbitrators in the Webcaster CARP, after receiving evidence over several months, including thousands of pages of briefs and hearing transcripts, also concluded that requiring a service to track and report all performances "would not significantly burden the services," even if the service had to report partial performances of sound recordings. CARP Report (Interim Public Version) at 107. The Copyright Office should similarly conclude that requiring services to report each transmission of any portion of a sound recording is not burdensome and, in fact, is needed by collecting entities to ensure proper payment of royalties when services pay on a per performance basis and for the allocation of royalties for distribution.

#### 2. Royalty Distribution

To give meaning to the purpose of the statutory license and the requirement to provide copyright owners with notice of the use of their sound recordings, reports of use must contain more information than the gross number of performances. For example, if a service reported that it made 10,000 Internet-only performances during a month and had a liability of \$0.0014 per performance, then a collecting entity would know that the service's liability was \$14. But a collecting entity would have no basis for allocating any of that money. Under law, however, those royalties must be allocated in a particular

manner. Fifty percent of the royalties are allocable to copyright owners, 45% are allocable to the featured recording artist(s), 2½% are allocable to nonfeatured musicians and 2½% are allocable to the nonfeatured vocalists. See 17 U.S.C. § 114(g)(2)(A)-(C).

The obligation to report with specificity each digital audio transmission of a sound recording is not limited to services that pay royalties on a per performance basis. For example, preexisting subscription services pay royalties equal to "6.5% of gross revenues resulting from residential services in the United States." 37 C.F.R. § 260.2(a). But those royalties also need to be distributed to the performers and copyright owners whose recordings were exploited by the service. As the Copyright Office has already determined, in order for a collecting entity to distribute royalties accurately to those entitled to receive such royalties, the collecting entity must have sufficient information to distinguish among all sound recordings performed by all types of services, including unique sound recordings that have the same title and are performed by the same artist. For example, one artist can perform the same song multiple times on multiple albums (e.g., a studio album and a live album) and each album can have a different label owner or different nonfeatured performers, or both.

RIAA proposes in Section IV *infra*, revised regulations that adopt uniform reporting obligations for all services regardless of the type of transmissions made by such services. These proposed regulations will facilitate the prompt and efficient distribution of statutory royalties to the copyright owners, featured artists and nonfeatured musicians and vocalists entitled to receive such royalties.

## C. The Breadth Of Programming Offered Under The Section 114 Statutory License Requires Detailed Reports Of Use

The ability to transmit sound recordings digitally via cable systems, satellite, the Internet or through wireless technologies is revolutionizing the industry of providing consumers with access to recorded music. Consumers are no longer limited to their local radio stations or compact discs, vinyl recordings or cassettes. Instead, a consumer can listen to the same radio station as she travels across the United States if she subscribes to one of the two preexisting satellite digital audio radio services. Or she can log on to the Internet and hear simulcast transmissions of radio stations from around the country or music from different decades, different cultures or different genres on one of the thousands of niche channels programmed by webcasters and broadcasters. Such offerings may be free to the listener or may require the payment of a subscription fee. A common trait of all of these services is that they chose to benefit from a statutory license (or an exemption) and to be subject to all of the requirements of the statute. As noted above, these requirements include paying a statutory royalty, complying with certain statutory conditions and providing copyright owners with detailed reports of use, a proposition established in the Original Determination and which has equal force today.

The royalties that stem from the Section 114 statutory license, for the first time in United States history, compensate artists and copyright owners for the public performance of their works. Accordingly, each transmission of a sound recording will result in an income stream for the copyright owner of the recording and the performers on such recording. This new income stream will benefit all copyright owners and performers – the big and small, and the famous and lesser known. But the only way to pay the copyright owners, featured artists and nonfeatured musicians and vocalists what

they are due for the exploitation of their recordings is to require reporting logs that detail each and every performance rendered, not simply a snapshot of what is played during a random time period on a random channel. This is especially true when one considers the breadth of music programming offered by digital music services, frequently on channels that are transmitted only to a single user for whom such channel was created using an algorithm that draws a playlist from a large universe of available sound recordings.

According to many of the witnesses who appeared in the Webcaster CARP, one of the great benefits of webcasting is that it provides music that is not available on overthe-air radio. These witnesses touted their ability to go deeper into catalogues and play highly themed genres, giving "promotion" to lesser-known performers who may not be affiliated with one of the major record companies. It is this very practice of offering such a varied range of music on an infinite number of channels that complicates the distribution of royalties, especially with regard to lesser known performers and smaller copyright owners. For example, webcaster witnesses testified that:

- "Echo's wide variety of music content gives it the ability to target a broader market than is generally reached by traditional broadcast radio." Written Direct Testimony<sup>3</sup> of Tuhin Roy, Executive Vice President in charge of Strategic Development, Echo Networks, ¶ 15.
- "Incanta exposes listeners to a diverse range of music not ordinarily available on broadcast radio." W.D.T. of Eric Snell, Chief Financial Officer, Incanta, Inc., ¶ 20.

<sup>&</sup>lt;sup>3</sup> Hereinafter, references to written direct testimony in the Webcaster CARP shall be cited as "W.D.T." The W.D.T. of witnesses from BET.com, Comedy Central, Coollink Broadcast Network, Echo Networks, Inc., Everstream, Inc., Incanta, Inc., Launch Media, Inc., Listen.com, Live365.com, The MTVi Group LLC, MusicMatch, Inc., myplay, Inc., Netradio Corporation, RadioActive Media Partners, Inc., RadioWave.com, Inc., Spinner Networks, Inc., Univision Online, Westwind, and XACT Radio Network LLC (collectively the "Webcasters") can be located in Volume VI (Public Version) of the Direct Case filing of the Services in Docket No. 2000-9 CARP DTRA 1 & 2 (Apr. 11, 2001).

- "Services like Launch expand the exposure offered to new artists and to older 'catalogue' product, as well, compared to traditional radio. Launch's wide variety of musical offerings enables it to target a broader market than is generally reached by today's over-the[-]air radio." W.D.T. of Robert D. Roback, Co-founder and Director, Launch Media, Inc., ¶¶ 23-24.
- "We are not constrained by circumscribed playlists. Indeed, our stations' playlists pull from an almost limitless number of songs in rotation compared to the 40-80 on over-the-air stations. This allows Launch to play all types of recordings, including the newest, oldest, and most eclectic recordings that traditional broadcast radio now largely passes over. . . . The capacity for Internet webcasters like Launch to provide exposure for such otherwise largely neglected music is unparalleled." W.D.T. of David Goldberg, Chief Executive Officer, Launch Media, Inc., ¶¶ 8-9 (emphasis in original).
- "[B]ecause Live365 streams a much wider variety of music than traditional broadcast radio, it is able to promote, and expose listeners to, a far greater range and depth of music than broadcast radio." W.D.T. of John O. Jeffrey, Executive Vice President, Corporate Strategy and General Counsel, Live365, Inc., ¶ 12.
- "[RadioSonicNet's] ["RSN"] wide variety of music content gives it the ability to target a broader market than is generally reached by today's over-the-air broadcast radio. By targeting the music genres available on professional and guest DJ stations and allowing users to indicate their preferences on consumer-influenced stations, RSN is able to earmark specific types of new music to users that RSN knows are more likely to be interested in that music." W.D.T. of Brad Porteus, Vice President, MTVi Radio, MTVi Group LLC, ¶ 23.
- "Another feature of RSN programming which distinguishes it in a positive promotional way from current over-the-air broadcast radio offerings is the diversity of music that RSN offers. Many over-the-air radio stations offer extremely limited playlists. The majority of radio stations in the country play a very narrow selection of sound recordings, thus confining the promotional value of airplay to those limited recordings. For the most part, over-the-air radio has abandoned "niche" formats. RSN is strikingly different because we offer a much wider array of music and, at the same time, are able to target our offerings to better suit the "niche" music tastes of our listeners. Indeed, no matter what a person's taste in music, they will be able to find a station that appeals to them on RSN; this is simply not the case with over-the-air radio today." W.D.T. of Quincy McCoy, Vice President, Music and Radio Programming, MTVi Group LLC, ¶¶ 11-12.

- "RadioAMP offers over 400 channels of music programming . . . . The music channels are organized according to genres such as modern rock/alternative, folk, contemporary rock, etc., and sub-genres, e.g., big band, fusion, smooth jazz, swing, etc." W.D.T. of Charlie Moore, Vice President of Business Development, RadioActive Media Partners, Inc., ¶6.
- o "Spinner currently offers listeners more than 150 unique internet radio channels spanning some 13 music genres ranging from Classical to Rap to Soundtracks. Spinner incorporates more than 300,000 songs in rotation. Generally, Spinner channels include more than 120 songs in rotation roughly three times (or more) the number of songs that terrestrial radio stations typically have in their rotation." W.D.T. of Fred McIntyre, Executive Director, Business Development, AOL Music, ¶ 3.

The other transmission services that operate under the Section 114 statutory license or an exemption offer similar types of programming to those offered by the Webcasters whose testimony is noted above. For example, both of the preexisting satellite digital audio radio services offer highly themed channels of music programming. Detailed reports from these services — as well from all other services — are necessary to ensure that the correct copyright owners and artists are compensated when a service digitally transmits a sound recording. Providing less than detailed reports of use will ensure that smaller copyright owners and lesser-known artists will be denied the royalties that they are entitled to receive.

## D. Detailed Reports Of Use Are Necessary To Enforce Statutory Requirements

As the Copyright Office recognized in its Original Determination, services operating under the statutory license must provide detailed reports of use to copyright owners so that they may enforce certain statutory requirements. See Original Determination, 63 Fed. Reg. 34,294. These requirements include limitations on program

length for certain transmissions<sup>4</sup> and the song frequency conditions set forth in the sound recording performance complement. See 17 U.S.C. § 114(j)(13).

While transmissions to business establishments are exempt from performance royalties and "not an infringement of section 106(6)," this is only the case "if . . . the transmission does not exceed the sound recording performance complement." Id. § 114(d)(1)(C)(iv). Nonexempt transmission services not eligible for the Section 114(d)(1)(C)(iv) exemption are covered by a statutory license, but statutory licensees must also comply with, among other things, the sound recording performance complement. See 17 U.S.C. § 114(d)(2)(C)(i). Therefore, services that operate under an exemption or a statutory license must provide information sufficient for determining the service's compliance with the sound recording performance complement.

Congress granted sound recording copyright owners the right to have performances of their sound recordings limited by the sound recording performance complement. As the only way to give meaning to that right is to require the reporting of comprehensive data on the transmission of each sound recording by exempt and statutory services, the Copyright Office should adopt regulations that provide copyright owners with information sufficient for ensuring compliance with the statutory requirements. <sup>5</sup>

<sup>&</sup>lt;sup>4</sup> Certain programming is eligible for a statutory license provided that "the transmission (I) is not part of an archived program of less than 5 hours duration; (II) is not part of an archived program of 5 hours or greater in duration that is made available for a period exceeding 2 weeks; [or] is not part of a continuous program which is of less than 3 hours in duration." 17 U.S.C. § 114(d)(2)(C)(iii)(I)-(III).

<sup>&</sup>lt;sup>5</sup> As the Copyright Office noted in the NPRM, the office proposed detailed reporting regulations "because the required information seems designed to accomplish the basic reporting objective of providing information with which copyright owners can generally monitor compliance with the terms of the licenses." NPRM, 67 Fed. Reg. at 5763.

#### III. RESPONSES TO ISSUES RAISED BY COPYRIGHT OFFICE

In this section, RIAA responds to the issues raised by the Copyright Office in the NPRM.

## A. Requiring Statutory Licensees To File A New Notice Of Use

The Copyright Office has proposed requiring each service operating under the Section 114 statutory license to file a new Notice of Use. NPRM, 67 Fed. Reg. at 5761-62. The Copyright Office believes that "many Services that have filed Initial Notices under the current regulation have ceased using the statutory license and, in many cases, have gone out of business altogether." Id. at 5762. The Copyright Office further stated that requiring the refiling of a Notice of Use "will make the Office's records more reliable." Id.

RIAA supports the Copyright Office's proposal to require services currently operating under the Section 114 statutory license or an exemption to file a Notice of Use that would provide current information about the service. Such information is particularly important for copyright owners because they frequently discover the use of their copyrighted recordings on various services and want to ensure that such services are operating under a license or an exemption and not infringing the copyright owner's exclusive rights. By having access to an updated Notice of Use, and assuming one that is identical or substantially similar to the one proposed by the Copyright Office, a copyright owner will be able to identify, among other things, the service making the public

<sup>&</sup>lt;sup>6</sup> No service has previously filed a "Notice of Use" with the Copyright Office. Rather, services have filed an "Initial Notice of Digital Transmission of Sound Recordings Under Statutory License." For ease of reference, the notice shall be referred to herein as a "Notice of Use."

performances or ephemeral reproductions, its contact information and the nature of the license and category of service offered. In the absence of such information, copyright owners could be required to expend significant time and resources investigating the innumerable sources of music on the Internet to determine whether such services are operating under a statutory license or an exemption or infringing the copyright owner's rights. This is true whether a collecting entity or an individual copyright owner conducts the investigation. Each dollar spent investigating a service represents one dollar less that can be distributed to the performers and copyright owners who earned the royalties.

RIAA further believes that requiring services to provide a new Notice of Use places no material burden on a service. A service would simply have to download the proposed form from the Copyright Office's website or obtain a copy from the Copyright Office directly, complete the form, and return the completed form with the nonrefundable filing fee to the Copyright Office, Licensing Division. It is inconceivable that such a filing requirement could impose a material burden on a service that would outweigh the substantial benefits of the new Notice of Use.

## B. Copyright Office Use Of A Standard Form Notice Of Use

The Copyright Office requested comment on the use of a standard form for the Notice of Use. Id. RIAA supports the proposal to require all services to file a standard form Notice of Use. As identified by the Copyright Office, a standard form will ensure "an accurate uniform record currently identifying all Services using these statutory licenses, indicating which licenses are to be used, the type of transmissions to be made under the section 114 license, and information concerning the date of first transmission or the date for making an ephemeral recording of a sound recording." Id. In addition, requiring a standard form will facilitate recordkeeping by the Copyright Office, reduce

errors in reporting and ensure that copyright owners have the information necessary to enforce their rights.

The proposed Notice of Use would also require a service to report the category of transmission it is operating for use of the Section 112 ephemeral license. As a service may operate under both Section 112 and 114, RIAA supports requiring services to identify under which statutory provision it operates.

## C. Elements In Proposed Standard Form Notice Of Use; Layout; And Utility

The Copyright Office requested comment on the elements in the proposed form Notice of Use, the layout of the form Notice and the utility of the form document. <u>Id.</u> at 5763. RIAA endorses the form Notice of Use proposed by the Copyright Office, subject to some minor modifications. The proposed form Notice of Use sets forth the requested information in a simple manner and will ensure that copyright owners can readily determine the type of service operating under the statutory provisions. As to the specific elements in the proposed form Notice of Use of Sound Recordings under Statutory License, RIAA proposes the following minor changes:

- Change the titled of the document from "Notice of Use of Sound Recordings Under Statutory License" to "Notice of Use of Sound Recordings Under Statutory License or Business Establishment Exemption."
- Change "Non-subscription transmission service" in Sections 6(a) and 6(b) to "Eligible nonsubscription transmission service" to conform to the statutory language in Section 114(j)(6). Using a term that is not the defined statutory term may lead to confusion as to the type of service eligible for the statutory license.
- Change "Preexisting digital audio radio service" in Sections 6(a) and 6(b) to "Preexisting satellite digital audio radio service" to conform to the statutory language in Section 114(j)(10). Using a term that is not the defined statutory term may lead to confusion as to the type of service eligible for the statutory license.

## D. Posting Notice Of Use On Copyright Office Website

The Copyright Office proposes to discontinue its practice of posting copies of each Notice of Use filed by a statutory licensee on its website. See id. RIAA opposes this proposed change in Copyright Office practice and strongly urges the continued posting of Notices of Use on the Copyright Office's website.

A Notice of Use is an important document that should be available publicly to all copyright owners of sound recordings, not just those that are located in the Washington, D.C. area. As most sound recording copyright owners are located outside the metropolitan Washington, D.C. area, posting of Notices of Use on a website will reduce the costs that companies would incur if their only option were to retain lawyers or some other entity to send to the Copyright Office to obtain these documents.

The ability to review a Notice of Use enables a copyright owner to determine whether a service that is making public performances of the copyright owner's sound recordings is operating under a statutory license or is infringing. There have been numerous instances where RIAA has accessed the Copyright Office's website to review filed Notices of Use in order to respond to inquiries from copyright owners. Copyright Owners have contacted the RIAA after finding their songs on various websites, requesting that the RIAA tell them whether the service exploiting those sound recordings is doing so in accordance with the statute. The RIAA has been able to respond promptly to these inquiries and confirm compliance with the notice requirements by reviewing the materials available on the Copyright Office website.

For those copyright owners who conduct their own investigations of a service's compliance with the statutory licenses, such as small copyright owners unaffiliated with a

major record company, access to the Copyright Office website facilitates their own enforcement activities. Availability of Notices of Use on a public website obviates the need to retrieve the documents directly from the Copyright Office, thereby avoiding the additional burden on the Copyright Office of handling these document requests.

RIAA believes that the burden to the Copyright Office of not posting the Notices would be significant. Without access to the posted Notices, individual copyright owners would resort to calling the Copyright Office to request facsimile transmissions of filed Notices of Use or simply to inquire as to whether a particular service has filed a Notice. Similarly, efforts by the Copyright Office to direct individual copyright owners to collecting entities would improperly shift costs to copyright owners and performers who would have to foot the bill for providing such a service, and, as those costs would be deductible administrative expenses, collecting entities would distribute fewer royalties to such copyright owners and performers.

Continuing to post Notices of Use on the Copyright Office's website would be consistent with certain goals expressed in Senate Resolution 21, which was submitted by Senator McCain for himself and Senators Leahy, Lott and Lieberman on February 14, 2001. Although not addressing the posting of the records of the Copyright Office or the Library of Congress, Senator McCain proposed "the public should have easy and timely access, including electronic access, to public records of the Congress" and that "the Congress should use new technologies to enhance public access to public records of the Congress." Directing the Sergeant-At-Arms to Provide Internet Access to Certain Congressional Documents, Including Certain Congressional Research Service

Publications, Senate Lobbying and Gift Report Filings, and Senate and Joint Committee Documents, S. Res. 21, 107th Cong. (2001).

To minimize its own costs, the Copyright Office should consider requiring statutory licensees to file a Notice of Use electronically. This would facilitate the posting of the Notice on the Copyright Office website. Services could simultaneously send a duplicate copy of the Notice with a signature through the U.S. Mail.

## E. Filing Of Notice Of Use With Collecting Entities

The Copyright Office seeks comment on a "possible change to the requirement that all notices be filed in the Copyright Office." NPRM, 67 Fed. Reg. at 5763. The Copyright Office asks whether it "[w]ould be more efficient for a Service to file its Notice of Use directly with the designated collection entity, rather than with the Copyright Office" and "requiring the Collective to make the notices available to the public for inspection and copying." <u>Id</u>. RIAA strongly opposes these proposed changes to Copyright Office policies.

First, RIAA believes that the Copyright Office should be the official repository for all Notices of Use. As the government agency designated to oversee the administration of statutory licenses for copyrighted works, the Copyright Office should have these official records within its control and readily accessible to it. It is the entity best suited to retain the official records of services operating under a statutory license or exemption. The Copyright Office already receives numerous types of filings from both copyright owners and users, and there is no reason why the Copyright Office should not continue to receive filings of Notices of Use from entities that operate under Section 112 or Section 114. See e.g., 37 C.F.R. § 201.4 (Recordation of transfers and certain other

documents); <u>Id.</u> § 201.9 (Recordation of agreements between copyright owners and public broadcasting entities); <u>Id.</u> § 201.11 (Satellite carrier statements of account covering statutory licenses for secondary transmissions for private home viewing); <u>Id.</u> § 201.17 (Statements of Account covering compulsory licenses for secondary transmissions by cable systems); <u>Id.</u> § 202.3 (Registration of copyright); <u>Id.</u> § 202.19 (Deposit of published copies or phonorecords for the Library of Congress).

Second, while there may be some benefit to having services provide Notices of Use directly to collection entities, the collection entities should not be required to substitute for the Copyright Office in providing open access to documents that are required under Congressional mandate. The collection entities are private institutions that provide a benefit to services by incurring all of the costs for collection and distribution of statutory royalties. Copyright owners and performers are forced to pay all of the costs for enforcement, collection and distribution out of the royalties paid by services. These costs are not borne by the Copyright Office or the services. Requiring copyright owners and performers to incur additional costs by serving as a quasi-governmental body would be inappropriate and detrimental to the interests of the copyright owners and performers entitled to receive statutory royalties.

Notwithstanding the foregoing, RIAA would request that the Copyright Office require services to provide a Notice of Use directly to each designated collection entity at the same time that such Notice of Use is filed with the Copyright Office. Such simultaneous filing will ensure that collection entities are aware of the services operating under Section 112 and/or Section 114, and will impose little burden on the service, as the proposed Notice of Use is a single page. A service would merely have to duplicate its

original filing and mail that copy to each of the designated collecting entities. This would eliminate the cost to the Copyright Office of providing duplicate notices to collecting entities.

Third, it is improper and beyond the authority of the Copyright Office to require private entities to provide open access to their premises for the purposes of requiring "the Collective to make the notices available to the public for inspection and copying."

NPRM, 67 Fed. Reg. at 5763. Additionally, SoundExchange does not have the facilities to offer members of the public access to documents of public record. There are no separate rooms available for the general public to review Notices of Use. Creating such "public reading rooms" would require renting additional office space in Washington,

D.C. at a tremendous cost. There are also no photocopy machines that are operated on a pay-per-copy basis, which would be required if members of the public had to be given the facilities to reproduce documents filed with SoundExchange. In the post-September 11<sup>th</sup> environment, office security has become a principal concern for many companies, as it has for the government. One need only attempt to enter the Madison Building at the Library of Congress to notice the increased security that has been implemented at public facilities. Collecting entities should not be required to hire a security staff similar to that employed by the Library of Congress.

In contrast to the significant burdens that would be placed upon RIAA and the SoundExchange under the Copyright Office's proposal, the Copyright Office and the Library of Congress are already equipped to receive Notices of Use and make such Notices available to the public for inspection and copying. See 37 C.F.R. §§ 201.2 (Information given by the Copyright Office); 201.2(b) (Inspection and copying of

records). There are dedicated reading rooms open to the general public and the Copyright Office maintains photocopy machines that require each user to pay a fee for each reproduction made of any material on file with the Library.

RIAA does not believe that there is any scenario where it would be appropriate, efficient or acceptable to require collecting entities to make available to the public for inspection and copying the Notices of Use to be filed by statutory licensees. Such access is clearly a function best offered by the government.

#### F. Periodic Filing Of Notice of Use

The Copyright Office seeks comment "on the advisability of requiring periodic filings of the notices of use in order to establish a continually current and updated file of Services operating under either the section 114 and section 112 licenses." NPRM, 67 Fed. Reg. at 5763. RIAA believes that an annual filing of a Notice of Use is advisable for the reasons identified by the Copyright Office.

The Copyright Office should maintain updated Notices that provide current information about the services. If services are required to file an initial Notice and an amended Notice only in the event of a material change in the previously filed information, then there is a substantial risk that services will forget to file such amended Notices. On the other hand, if statutory services are required to file a Notice of Use during each year that the service operates under one or more of the statutory licenses, then the Copyright Office's files and website would have current information that would be available to all copyright owners and performers. RIAA agrees with the Copyright Office's position that regardless of the frequency with which a service must make

periodic filings of a Notice of Use, a service should be "required to update its filing within 45 days of a change in the information reported." <u>Id</u>.

The statutory licenses require that notice of use be given to copyright owners by users, and that such notice be reasonable. See 17 U.S.C. §§ 112(e)(4), 114(f)(4)(A). Reasonable notice mandates that the copyright owners be able to identify, in a timely fashion and on a prospective basis, which services will be using their works. The proposed regulations would enable copyright owners to identify services, while imposing little if any burden on such services.

### G. Payment Of Filing Fee

The Copyright Office currently requires a \$20 fee to be filed with a Notice of Use. NPRM, 67 Fed. Reg. at 5763. The Copyright Office invited comment on whether "if the Office adopts a rule requiring Services to file the Notices of Use directly with the designated collective . . . there should be a filing fee and how much that fee should be."

Id. For the reasons set forth in Section III.E supra, RIAA urges the Copyright Office to maintain its policy of requiring statutory licensees to file their official Notice of Use with the Copyright Office. If the Copyright Office maintains this policy and also requires services to provide a simultaneous copy of the Notice to each designated collecting entity, then RIAA does not believe that it is necessary for the Copyright Office to require a service to pay an additional filing fee to each such collecting entity.

On the other hand, if the Copyright Office requires services to file Notices of Use with collecting entities and <u>not</u> with the Copyright Office, and further requires collecting entities to make such Notices available for public inspection and copying, then RIAA believes that services should bear the <u>total</u> costs incurred by the collecting entity in

providing such access to the general public. These recoupable costs would not be deducted from the royalties to be paid by the services but would be a separate, additional fee payment that would have to be allocated among all operating services on a basis to be determined. The collecting entity should be permitted to recoup costs for, by way of example and not limitation, rent, utilities, cleaning services, taxes, filing expenses, security and equipment rental.

Again, RIAA believes it is inappropriate for collecting entities to be required to bear the costs of providing a service that is best offered by the Library of Congress and the Copyright Office. Requiring copyright owners and performers to pay for such services is contrary to law, has no basis in the Section 112 or Section 114 statutory licenses and is contrary to the Congressional intent to compensate copyright owners and performers for the use of their creative works through digital audio transmissions or the making of ephemeral reproductions.

## IV. RIAA'S PROPOSED UNIFORM REGULATIONS FOR ALL STATUTORY LICENSEES

As noted above, RIAA proposes herein a uniform report of performances to be provided by all services operating under the Section 114 statutory license or the limitation on exclusive rights in Section 114(d)(1)(C)(iv). These proposed, revised regulations are attached as Exhibit A. A compare version detailing RIAA's edits to the proposed regulations contained in the NPRM is attached as Exhibit B. A spreadsheet showing the ordered layout of the uniform report of performances is attached as Exhibit C. There would also be a uniform report for the creation and destruction of ephemeral phonorecords created under the Section 112 statutory license. A spreadsheet showing the ordered layout of the ephemeral phonorecord log is attached as Exhibit D. In this section,

RIAA describes the specific regulations it is proposing and why the Copyright Office should adopt these regulations.

### A. Overview of Royalty Collection And Distribution

The collection and distribution of statutory royalties is the principal function of a collecting entity. In serving as an agent for its members or clients, the collecting entity seeks to collect the full amount of statutory royalties payable by all statutory services and then distribute as much of those collected royalties to each of the entities entitled to share in those royalties, including copyright owners, featured artists and nonfeatured musicians and vocalists. The task of processing all of the reports of use that are delivered by statutory licensees is complex and time consuming. Following is a brief description of how SoundExchange processes reports of use from services.

The report of use is received or obtained in an electronic format, for example through use of a zip diskette, jaz diskette, CD-R or any other acceptable means. The data included in the report of use is loaded for processing in the SoundExchange royalty distribution system. As part of this process, a series of data integrity tests are performed that check for completeness of data, field formats, field length, etc. If the report of use fails this test, SoundExchange may or may not notify the service to submit a new and more complete report depending upon the degree of failure.

Additional tests are run on the reports of use to identify changes in volume of reporting from previous submissions. If changes exceed tolerance levels,

SoundExchange must determine if the results were due to an incomplete report of use or if the nature of the programming of the particular licensee has changed. A final determination is made by manually reviewing the report of use or by communicating with the service.

If the report of use passes the load test, then SoundExchange manually performs comprehensive data analysis and research to ensure the correct match of the sound recording to the proper copyright owner. The amount of work involved in this evaluation and clean-up process cannot be overstated. It involves researching each sound recording submitted through publicly available Internet resources or publications of releases, mining previously reported, cleaned-up or evaluated information from the same or other statutory licensees, or the repertoire expertise of SoundExchange staff. This comprehensive research and evaluation process is time-intensive and critical in identifying the copyright owner and artist entities entitled to the distribution of performance royalties and ensuring that each and every copyright owner and artist, no matter how large or small, has the correct performances attributed to them.

As the Section 114 license gives a service the right to perform any sound recording that has "been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording," 17 U.S.C. § 114(d)(2)(C)(vii), there are an enormous number of sound recordings that may be reported to SoundExchange in any given month. The burden on SoundExchange of processing all of these sound recordings is frequently magnified by a service's failure to take the time to report the required information accurately or at all. For example, services will report a featured artist as "Various." This occurs most frequently when a sound recording is taken from a compilation album and the service fails to report the actual artist performing a transmitted sound recording from the several artists on the album. Another frequent problem is misreporting the featured artist for a classical sound recording as the composer (e.g., Beethoven or Mozart). In such an

instance, SoundExchange may have no basis for distributing those royalties to the orchestra or entity entitled to such royalties.

Once all of the information from the sound recording meta data has been received, researched and corrected, SoundExchange can perform a sound recording performance complement test to ensure that the service's transmissions are in compliance with the terms of the statute. Additional testing for statutory compliance can be run for requirements such as time limitations of archived programming. If the report of use fails the test, SoundExchange can notify the service of the violation so that the licensee can remedy the noncompliance and make appropriate modifications and corrections to their programs.

Before finalizing the performance data for distribution, various quality-assurance procedures are conducted. For example, tests are run to ensure performances have not been attributed to labels known not to own copyrights (such as compilation companies), to review any labels not associated with a copyright owner and to review copyright owners and artists whose accounts are on hold or have invalid addresses.

Finally, after all tests are complete, the data is ready to be processed for royalty distribution. Depending on whether SoundExchange has acquired the requisite tax information, bank routing information and mailing address for each recipient of statutory royalties, the funds are then distributed to copyright owners based on the reported Track Label (P)-Line information, to reported featured artists and the independent administrator(s) for nonfeatured performers.

The data elements included in RIAA's proposed regulations are intended to provide collecting entities with the information needed for identifying copyright owners

and performers in all instances. The request for comprehensive data is intended to ensure the ability to distribute royalties to all entitled copyright owners and performers, not just those for whom information is readily available. Moreover, the minimal burden imposed upon statutory licensees to provide the information requested on RIAA's proposed uniform report of performances is outweighed by the tremendous, additional burden that would be incurred by a collecting entity if it had to expend more time and money identifying copyright owners and/or featured performers, especially since it might not have access to the source product of the sound recordings used by the service.

## B. The Proposed Reports Of Use Should Establish Uniform Reporting Obligations For All Services

The Copyright Office has proposed final regulations for the "Report of Use of Sound Recordings under Statutory License" to be filed by any service operating under the Section 112 and Section 114 statutory licenses: (1) preexisting subscription services; (2) preexisting satellite digital audio radio services; (3) new subscription services and (4) eligible nonsubscription transmission services. See NPRM, 67 Fed. Reg. at 5765.

Although different regulations would apply to the preexisting subscription services (DMX/AEI, Music Choice and Muzak) than to all other types of transmission services under the Copyright Office's proposed regulations, the specific data elements to be provided by all services under those regulations are substantially similar. This is because similar data is required from all services in order to permit a collecting entity to collect and distribute royalties properly and to enforce the statutory rights of the copyright owners it represents.

## 1. RIAA's Reasons For Proposing Alternative, Uniform Report Of Use

When the RIAA petitioned the Copyright Office to adopt reporting regulations for certain types of statutory transmission services, it limited its petition to proposed regulations for eligible nonsubscription transmission services and new subscription services. See RIAA Petition for Rulemaking to Establish Notice and Recordkeeping Requirements for the Use of Sound Recordings in Certain Digital Audio Services (May 24, 2001) (the "RIAA Petition"). In light of the Copyright Office's proposal to adopt regulations for all Section 112 and Section 114 statutory licensees, the RIAA herein submits for the Copyright Office's consideration slightly revised reporting requirements that would create a uniform report of performances for use by all services, including those services operating under the limitation on exclusive rights in Section 114(d)(1)(C)(iv), as such services must comply with the sound recording performance complement in order to be eligible for the statutory exemption.

Deviation from what was previously proposed – a separate playlist and listener log – is prompted by several conditions that have changed since the filing of the RIAA Petition. These changes are the result of: (1) the proposal of the Copyright Office to adopt notice and recordkeeping regulations that apply to all services making ephemeral phonorecords or digital audio transmissions under the Section 112 and/or Section 114 statutory licenses; (2) the rate mechanism adopted in the Webcaster CARP that requires the payment of a royalty for each transmission of any portion of a sound recording; (3) changes in the implementation of streaming technology that make the reporting of a uniform performance log preferable to the reporting of separate playlist and listener logs; (4) efforts to address the weaknesses and inefficiencies in the data reporting requirements

for the preexisting subscription services that have been discovered since the requirements were adopted in the Original Determination; (5) responses to concerns expressed by statutory licensees regarding the privacy of user information in a listener  $\log^7$  and the lack of source information for data to be provided in a report of use; and (6) efforts to ensure that copyright owners have the information necessary for ensuring compliance with the requirement for the statutory exemption in Section 114(d)(1)(C)(iv).

RIAA proposes adding only a few additional fields to the reports of use to be provided by services. These include fields for "Transmission Category," "Genre," "Type of Program" and "Influence Indicator," most of which are necessitated by the determinations in the CARP Report, discussed in Section IV.F.1 infra; the "Total Number of Performances," again necessitated by the determinations in the CARP Report, discussed in Section IV.F.2 infra; and only four additional fields for specific sound recordings, the "Track Label (P)-Line," the "Duration of the Sound Recording," the "UPC" and the "Release Year," discussed in Section IV.F.3 infra. The Original Determination required services to report the "Recording Label," see Original Determination, 63 Fed. Reg. at 34,297, without distinguishing between the "Marketing Label" and the "Track Label (P)-Line," discussed in Section IV.F.3. infra.

SoundExchange worked directly with the preexisting subscription services to provide both the Marketing Label and the Track Label (P)-Line in order to facilitate copyright owner identification and correct distributions. The standard report of use currently being

<sup>&</sup>lt;sup>7</sup> The Listener Log proposal was never intended to provide copyright owners with personally identifiable information on users. Rather, it was intended to make it easier for a service to report the total number of performances through the use of a report that would overlay the playlist and provide information on the number of users receiving transmissions.

provided by the preexisting subscription services provides a field for both types of label information. RIAA seeks now to codify the practice adopted by all preexisting subscription services.

# 2. A Uniform Report Of Use Provides Benefits To Both Services And Collecting Entities

Under the Copyright Office's proposed regulations, reporting requirements would vary depending upon the type of service making the digital audio transmission. RIAA's proposed revisions – which are substantially similar to those proposed in the RIAA Petition and the NPRM – would require each service to report transmissions on a uniform report of performances. The information on the proposed report of use is necessary to:

(1) ensure proper payment of statutory royalties; (2) facilitate the accurate distribution of statutory royalties to copyright owners, featured artists and the independent administrator(s) for nonfeatured musicians and vocalists; (3) provide copyright owners with notice of use of their sound recordings, as is required under Section 112(e)(4) and Section 114(f)(4)(A); and (4) provide each copyright owner with information necessary to ensure a service's compliance with the requirements of the statutory license.

As the Copyright Office has noted, "it is likely that the basic requirements for notice and recordkeeping will be similar for all Services." NPRM, 67 Fed. Reg. at 5762. A uniform report of performances takes account of the similarities among the various types of services and has significant benefits for both services and collecting entities.

First, the adoption of a single report of use would permit a service offering multiple types of transmissions (e.g., satellite digital audio radio service transmissions and eligible nonsubscription transmissions) to report all transmissions of sound recordings using a single reporting system, obviating the need for the service to incur the expense of

developing, purchasing or maintaining multiple mechanisms to capture playlists and listener logs depending upon the type of transmission made. The adoption of a single report will simplify the process of providing copyright owners with notice of the use of their sound recordings. Second, collecting entities would need to develop only one central, automated system to process a uniform report of use, rather than having to develop or purchase several systems to handle different types of reports of use from different types of transmission services. Third, the adoption of a uniform report of use would spur third-party vendors to develop reporting systems that can be marketed to any service operating under a statutory license or a statutory exemption. Fourth, the cost savings that a collecting entity would derive from having to develop or purchase only one automated system would reduce administrative expenses and permit distribution of a greater percentage of the statutory royalties collected to individual copyright owners, featured artists and nonfeatured musicians and vocalists.

3. SoundExchange's Experience In Distributing Royalties Under The Original Determination Justifies Modification Of Reports of Use

In processing over 85 million performances during the distribution of the preexisting subscription services royalties for the period February 1996 through March 2000, SoundExchange identified weaknesses in the reporting requirements adopted in the Original Determination. In some cases, usage logs provided by the preexisting subscription services contained incomplete, ambiguous or inaccurate information, limiting SoundExchange's ability to identify the correct copyright owner and/or artist. In order to prevent these identification problems, which require the expenditure of substantial resources that would otherwise be available for distribution to copyright

owners and performers, the RIAA has recommended the addition of a few additional data elements to the proposed regulations.

These additional elements should facilitate the proper identification of featured performers and copyright owners, especially in cases where the service reports fields with incomplete or inaccurate data. The simple fact is that the more data a service reports – particularly where such data is readily available to the service – the more cost effectively the statutory royalties can be distributed, thereby maximizing the royalties available for distribution.

4. A Uniform Report Of Use Should Be Adopted For All Services, Including Those Already Reporting Under The Original Determination

RIAA's proposed uniform report of performances would require preexisting services to make only minor adjustments to the interim report of use currently used by such services. However, even if the adjustments were more significant, the Copyright Office should not permit current business practices to impede the eventual implementation of regulations that create efficiencies for both services and collecting entities. In fact, the Copyright Office and the parties in that first proceeding recognized that experience and changes in the business of making digital audio transmissions might result in technological solutions to facilitate the reporting of the required data elements. It was for this reason that the rules were established on an interim basis. Moreover, there would be no commercial benefit to having different reporting regulations for different types of transmission services. To the contrary, such different regulations will necessarily increase the administrative costs of collecting entities and so reduce the royalties available for distribution.

While the uniform report of performances would contain data fields to be completed by all services, certain data fields may be left blank or completed in a different manner depending upon the type of service transmission. For example, a preexisting subscription service would not be required to provide the number of recipients receiving transmissions, assuming such information is not available for a transmission model that is similar to over-the-air radio (i.e., there is no feedback from a recipient's receiving device that informs the service that a particular transmission has been received). Rather, the number of performances for each sound recording would be reported as "one" (1). Similarly, commercial broadcasters offering the simultaneous Internet transmission of their over-the-air signal would report "zero" (0) performances if there were no listeners receiving a transmission of the particular sound recording. On the other hand, eligible nonsubscription transmission services, which establish a direct connection with the recipient<sup>8</sup>, would need to provide information on each performance transmitted to a listener. See CARP Report, Appendix B, § 1(1). Exhibit E provides examples of completed uniform reports of performances for certain hypothetical services.

The proposed uniform report of performances would require services to report actual transmissions. RIAA believes that requiring a service to report actual transmissions ensures the distribution of statutory royalties to those persons or entities actually entitled to such royalties. Moreover, as many of the services operating on the

<sup>&</sup>lt;sup>8</sup> <u>See</u> W.D.T. of Jonathan Zittrain, Professor, Harvard Law School, Expert Testimony on Behalf of Broadcasters and Webcasters, Vol. I (Public Version) (Apr. 11, 2001): "[E]ach user receives her own independent transmission, despite the fact that others may be 'tuned in' to exactly the same webcast and thus hearing the same thing. Such independent transmissions begin at the content provider's media server... and, as users request content, initiate a separate transmission to each user." <u>Id.</u> ¶ 18 (internal citation omitted); "[C]ontent is sent on to those users requesting it... [I]n general a separate transmission must be sent from the server to each individual client." Id. ¶ 20.

Internet create channels of programming on the fly, it is impossible to provide "intended playlists" as such playlists do not exist. While RIAA does not believe that it is appropriate to have some services report "intended playlists" on a uniform report of performances while others report "actual playlists," it recognizes that the preexisting subscription services have already established systems for reporting "intended playlists." So as not to disrupt current business practices, RIAA does not object to the preexisting subscription services being permitted to continue to report for a reasonable period of time their "intended" transmissions. RIAA urges the Copyright Office, however, to require the submission of "actual playlist" information on the uniform report of performances from all other services operating under the Section 114 statutory license or the limitation on exclusive rights in Section 114(d)(1)(C)(iv). In addition, RIAA believes that all services, including the preexisting subscription services, should provide copyright owners with notice of use on RIAA's proposed uniform report of performances rather than on reporting logs that are tailored to each type of statutory transmission. Therefore, preexisting subscription services would be required to report certain additional information on the specific sound recordings included in an intended playlist (e.g., marketing label, genre, the UPC and the release year, discussed in Section IV.F.3 infra), but such information would be identical to the information on sound recordings provided by all services.

#### C. Risks Of Reporting Too Few Data Elements In A Report Of Use

SoundExchange faced significant obstacles when it processed over 85 million performances for the first digital performance distribution in the fall of 2001, which covered royalties received from preexisting subscription services between February 1996 and March 2000. While the majority of the processing was handled by an automated

database system developed internally by SoundExchange, a significant number of performances were manually reviewed to ensure proper copyright owner and artist identification. A large percentage of the meta data garnered from the preexisting subscription services' reports of use contained either incomplete information or information that did not provide conclusive evidence as to copyright ownership. Due to this insufficient copyright ownership information, approximately 20% of the royalties paid by preexisting subscription services for the period February 1996 through March 2000 could not be distributed, thereby delaying payment of the royalties to the copyright owners and performers entitled to the money. Instead, SoundExchange retained the money in an interest-bearing, unallocated funds account. SoundExchange continues to expend time and money researching many of these performances and it hopes to distribute the remaining, historical royalties during its next distribution.

RIAA believes that the mere use of the proposed uniform report of performances would reduce the quantity of performances that services report either inaccurately or with insufficient information for accurate and prompt ownership confirmation and distribution. This is because receiving more data from a service – even if in some cases some of the data is incomplete – permits a collecting entity to conduct a more comprehensive search for copyright owner and performer information (e.g., the additional data provides more pieces to the puzzle). For example, RIAA estimates that if the preexisting subscription services reported their performances under the proposed uniform report of performances proposed by RIAA, see Exhibit A, over 50% of the unallocated and undistributed royalties could have been resolved in time for those royalties to be included in the initial distribution.

### D. Services Already Use Technologies That Facilitate Detailed Reporting

The Copyright Office has already decided that services must provide copyright owners with the data necessary for ensuring compliance with the statutory requirements.

See Original Determination, 63 Fed. Reg. 34,289, 34,294. Services will be able to provide these detailed reports of use needed for enforcing the statutory requirements through software already in use for making transmissions. Services already use computer algorithms and programming software to deliver music to listeners. Therefore, the requirement to compile in a database information that is already available in machine-readable format would create little, if any, burden on services. In addition, services frequently develop proprietary technologies (and in some cases patent-pending technology) to, among other things, facilitate the sale of advertising or to offer personalized programming, and such software should be adaptable for providing detailed reports of use. Numerous witnesses described their company's use of sophisticated software solutions during the Webcaster CARP:

- "[Echo Network's] proprietary Song Selection technology delivers music based on an algorithm that takes into account members' ratings and preferences, editors picks, chart hits and data describing correlations between artists and styles." W.D.T. of Tuhin Roy, Executive Vice President, Strategic Development, Echo Networks, Inc., ¶ 5.
- "Everstream has developed various proprietary technologies. These include software for managing online advertising. The Advertising Order Management System ("OMS™") allows advertisements to be configured to complex targeting parameters such as date ranges, days of the week, hours in a day and music formats." W.D.T. of Steven McHale, President and CEO, Everstream, Inc., ¶ 22.
- "Launch has developed, both internally and through acquisition, an extensive suite of software applications and database services intended to support the delivery of Internet radio to a very large audience in a manner which fosters music and artist discovery through proprietary 'suggestion engines,' which supports the publishing of new music to our entire network within hours, and which allows for careful tracking and

reporting, both individually and in aggregate, of music consumed through the service. Much of the software and database services created for these applications is proprietary, patent-pending and unique to Launch Media." W.D.T. of Robert D. Roback, Co-founder and Director, Launch Media, Inc., ¶ 28 (emphasis added).

- "The station's playlists are generated by a computer algorithm based on information provided by Listen's station programmers." W.D.T. of Rob Reid, CEO and Founder, Listen.com, Inc., ¶ 6.
- "The Live365 player is an audio player that is embedded in an Internet browser and is designed to display a pop-up window with various information and buttons, including artist, album and song information for the song being streamed as well as the prior two songs . . . . In addition, Live365 has created a playlist window that can be used with our own player as well as others in order to deliver the artist, album and song information." W.D.T. of John O. Jeffrey, Executive Vice President, Corporate Strategy and General Counsel, Live365, Inc., ¶ 10.
- "A computer algorithm develops the actual playlist, ensuring that literally each listening session is a unique and unpredictable sequence of songs from playlist-to-playlist and listener-to-listener. Literally, each time someone listens to any of the stations, a unique song sequence is generated dynamically on the fly." W.D.T. of Brad Porteus, Vice President, MTVi Radio, MTVi Group LLC, ¶7.
- "The algorithm takes into consideration the user's submitted preferences in building sound recording playlists based on the relative weights of the settings. The identity and order of sound recordings played is determined according to criteria designed to ensure compliance with the DMCA's statutory license requirements." Id. ¶ 10.
- "[RadioSonicNet] licenses much of its software technology, including the streaming, from third-parties. However, it has also developed significant technology in-house at considerable expense, including certain database tables, the algorithms that produce the playlists and the logic that allows the incorporation of listener preferences, and its own proprietary encoding and ripping software." Id. ¶ 38.
- o "To ensure compliance with the mandates of the DMCA, myplay developed software which examines the playlist created by the user for compliance with the sound recording performance complement and augments or otherwise adjusts the playlist if it is non-compliant." W.D.T. of David Pakman, President of Business Development and Public Policy, myplay, Inc., ¶ 5.

- "[RadioAMP] has developed a comprehensive content management and delivery infrastructure for delivery of customized audio and video content to a target audience of listeners on behalf of third party clients. RadioAMP has built a scaleable system that allows us to create custom solutions using a common/shared infrastructure." W.D.T. of Charlie Moore, Vice President of Business Development, RadioActive Media Partners, Inc. ("RadioAMP"), ¶ 15.
- "Spinner has developed a computerized content management system that ensures compliance with the eligibility requirements of the statutory license under the Digital Millennium Copyright Act." W.D.T. of Fred McIntyre, Executive Director, Business Development, AOL Music, ¶ 5.
- "XACT's patent-pending Music Scheduling Algorithm ("MSA") technology programs music based on the actual playlist of the XACT affiliate." W.D.T. of David Juris, President and CEO, XACT Radio LLC, ¶7.

Detailed reporting would also not appear to be a problem for many terrestrial broadcasters simulcasting their AM or FM signals over the Internet. According to a story in the Wall Street Journal on Monday, February 25, 2002, many stations already use software and hardware that could be utilized to provide the data set forth in the proposed regulations:

[R]adio technology was changing rapidly. In the mid-1990s, stations began buying software and hardware that allowed them to run their on-air programming with computers that contained entire catalogues of digital songs. Using such systems, DJs could also digitally record voice bits and drop them into a preformulated schedule of songs and commercials. Stations had long been able to prerecord some materials, using tape setups. But now a disc jockey could put together a perfect five-hour shift in less than an hour, using a computerized system that lets the DJ hear just the end of one song and the beginning of the next.

Clear Channel and its predecessor companies began installing the technology in all its stations in the late 1990s, and linking them together into a giant high-speed digital network to move digital recordings around seamlessly.

Anna Wilde Mathews, A Giant Radio Chain Is Perfecting the Art Of Seeming Local, DJs for Clear Channel Use High-Tech Gear to Sound Like They're Next Door, Wall St. J., Feb. 25, 2002, at A1.

It strains credulity to believe that the sophisticated broadcast corporations that simulcast AM or FM signals over the Internet or the entrepreneurial companies that provide Internet-only or simulcast programming, or both, can develop proprietary algorithms and software to program innumerable stations and sell targeted advertising but are unable to provide the types of reporting logs required for operation under a statutory license or exemption. If companies streaming music on the Internet are sophisticated enough to digitize entire libraries of music to offer their listeners thousands of distinct sound recordings, develop technologies to strip out local commercials from over-the-air transmissions in order to replace them with Internet-only commercials for a worldwide audience, and create distinct streams for individual users, then they are capable of developing or purchasing automated systems that will enable them to provide the information that copyright owners need to distribute royalties to each and every copyright owner, artist and nonfeatured musician and vocalist entitled to receive such royalties and enforce their statutory rights.

## E. The Information Requested In The Proposed Uniform Report Of Performances Is Readily Available To Services

The information requested for the uniform report of performances is readily available to the services. For commercially released compact discs, the information is available on the paper insert (referred to in the industry as the "label copy") of the compact disc. See Exhibit F (images of commercially released CD product inserts with notations identifying specific data elements). For promotional, pre-release product supplied by record label distributors, which does not represent the format eventually made available to consumers, some (but not necessarily all) of the requested information will be included in the product delivered to a service. See Exhibit G (images of pre-

release or promotional released CD product inserts with notations identifying specific data elements). The absence of some data on a promotional release may delay a service's ability to upload certain identifying information into a database at the time the database is populated with the promotional release or prevent the completion of all of the data fields in a uniform report of performances without reference to other sources. However, promotional releases of sound recordings will almost always include the artist name, the sound recording title, the label name, the release year of the sound recording and the duration of the sound recording. See Exhibit G. Promotional releases also may provide the title of the forthcoming album on which the sound recording will be released. See Exhibit G-3 (column (xiv)), G-4 (column (xiv)).

In the unlikely even that certain requested information is not available on a compact disc or the packaging for the compact disc, alternative sources for the missing information are readily available to a service. For example, if a statutory service receives a promotional, pre-release version of a sound recording on April 1, the commercial release of that same sound recording will generally be available within 6-8 weeks. Upon commercial release of the sound recording after the pre-release period, the service could research the sound recording on a variety of online and other reference sources in order to obtain the missing data elements requested in the uniform report of use. The service could also request catalog information from the record label providing the promotional release or visit the website of the label providing the promotional release for updated information. See Exhibit H (images of new release catalog information received from distribution entities); Exhibit I (list of publicly available websites that provide links to

record label websites, and through which a service in search of data elements for the proposed uniform report of performances could conduct free research).

If services fail to provide all of the data elements requested in a report of performances, the collecting entities will expend significant time and resources obtaining from other sources the very information that makes up the report of performances. It is the report of performances information that enables the collecting entities to identify and pay the appropriate copyright owners and featured artists. These expenditures increase the administration costs of royalty collection and distribution and decrease the royalties available for distribution to copyright owners and performers. Even if statutory services were adding a few hundred new sound recordings to their individual services during any one reporting period, it would still be more economical for each service to provide complete data on those releases it added to its own service than to shift the burden to a collecting entity that would have to research <u>all</u> sound recordings added by <u>all</u> statutory services during such reporting period.

To facilitate the accurate reporting of data on the uniform report of performances and in response to concerns expressed by certain services about the difficulty of locating the requested data elements, RIAA has set forth in Exhibits F, G and H images of CD product inserts and pages from new release catalogs from label distribution entities with notations identifying the specific data elements on pre-release and commercially released product. These examples are intended to assist services in the proper identification and reporting of the information requested in the proposed regulations.

A service should incorporate all of the data elements contained in promotional or commercially released product when they first load an ephemeral phonorecord of a sound

recording into a database from which transmissions are made. Certain services are already required to enter album, artist and song title information into a programming database in order to comply with the statutory requirement to display such information during the transmission of the sound recording. See 17 U.S.C. § 114(d)(2)(C)(ix). These services can reduce their costs of providing reports of use and the costs to collecting entities of royalty distribution by merely expanding their current business process established to enter the album, artist and song title information into a database to include a process for entering all of the other data elements needed for accurate reporting and distribution of statutory royalties, such as catalog number, release year, marketing label, duration of the sound recording, etc. Alternatively, a service can rely upon a vendor to provide a database of sound recordings that already includes all of the information requested in the uniform report of performances.

The obligation to research and provide complete information is also best borne by the services, as each service selects the sound recordings to be added to a playlist and transmitted to users, and so the services control the specific identifying information.

Services are in the best position to determine which product a sound recording is taken from and to report all of the relevant information from such product so that the appropriate copyright owner and performers may be compensated for the use of their sound recordings.

### F. Explanation Of Data Elements In RIAA's Proposed Uniform Report Of Performances

RIAA's proposed uniform report of performances can be divided into three principal parts: (1) information identifying the licensee as well as the type of service and programming offered by the licensee; (2) information regarding the digital audio

transmissions of sound recordings; and (3) information regarding the specific sound recordings transmitted to the public. Each part of the uniform report of performances is explained below. As noted in Section IV.B.1 *supra*, many of the data fields in RIAA's proposed uniform report of performances are already required under the Original Determination.

1. Information Identifying The Service And The Type Of Service And Programming Offered (RIAA Proposed 37 C.F.R. § 201.36(e)(1)(i) – (vi))

In providing collecting entities with reports of use, it is important that each service identify itself and the type of transmissions it is providing to users. The "Service Name" (proposed Section 201.36(e)(1)(i)) is required in order to identify and differentiate reports of use among all services. As a collecting entity may receive logs from hundreds if not thousands of services, where services may pay royalties based upon different royalty structures (e.g., percentage of revenues versus per performance) and at different rates (e.g., transmissions of Internet-only programming versus transmissions of AM or FM terrestrial programming), it is imperative for a service to identify itself for each line entry in a log so that there is no possibility of attributing the performances contained in one log to another service as royalties are distributed on a service-by-service basis. The requirement to have the Service Name appear on each line entry is a precaution in the event reports of use are delivered in or divided into segments, in which case the header containing the Service Name could be separated from the individual data entries. The

<sup>&</sup>lt;sup>9</sup> The information on sound recordings can be further divided between information on the sound recording itself and information on the album or product that contains the sound recording.

<sup>&</sup>lt;sup>10</sup> The lower-case, Roman numeral references in RIAA's proposed 37 C.F.R. § 201.36(e)(1)-(2) are also used in the column headings in Exhibits C and D.

Service Name is already required under the Original Determination. <u>See</u> Original Determination, 63 Fed. Reg. at 34,296.

The "<u>Transmission Category</u>" (proposed Section 201.36(e)(1)(ii)) is required to identify the correct royalty structure under which the service calculates its statutory liability. Preexisting subscription service transmissions and business establishment service royalty payments are currently based on a percentage of revenues. Eligible nonsubscription transmission service royalty payments are based on a per performance rate, but there are different rates for different types of eligible nonsubscription transmissions. Rates for other types of services have yet to be determined. Also, one service could offer multiple types of statutory transmissions and be required to pay different rates for each type of transmission. Without knowledge of the specific type of transmission being reported, a collecting entity could not verify royalty payments.

RIAA proposes the following Transmission Categories for transmissions:

<b>Category Code</b>	Description
WS	Simultaneous webcaster eligible nonsubscription
	transmissions of over-the-air AM or FM radio broadcasts
WI	All other Internet-only webcaster eligible nonsubscription
	transmissions
CBS	Simultaneous commercial broadcaster eligible
	nonsubscription transmissions of over-the-air AM or FM
	radio broadcasts
CBI	All other Internet-only commercial broadcaster eligible
	nonsubscription transmissions
NCBS	Simultaneous non-CPB, non-commercial broadcaster
	eligible nonsubscription transmissions by the same radio
	station
NCBI2	Other eligible nonsubscription transmissions by a non-
	CPB, non-commercial broadcaster, including up to 2 side
	channels of programming consistent with the mission of
	the station
NCBI	Other eligible nonsubscription transmissions by a non-
	CPB, non-commercial broadcaster

PES	Preexisting subscription service
SDARS	Preexisting satellite digital audio radio service
NES	New subscription service
BES	Business establishment service

The Category Codes for WS, WI, CBS, CBI, NCBS, NCBI2, NCBI and BES are necessitated by the rates recommended by the copyright arbitration royalty panel in the Webcaster CARP. See CARP Report, Appendix A, Summary of Royalty Rates for Section 114(f)(2) and 112(e) Statutory Licenses.

The "Channel or Program Name," (proposed Section 201.36(e)(1)(iii)), "Type of Program" (proposed Section 201.36(e)(1)(v)), and "Influence Indicator" (proposed Section 201.36(e)(1)(vi)) are characteristics of the service's transmissions and are necessary for enforcement of the statutory requirements. The Channel or Program Name field is needed for evaluating compliance with the sound recording performance complement because the evaluation is done for each channel of programming offered by the service. See 17 U.S.C. § 114(j)(13) ("The 'sound recording performance complement' is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than . . .") (emphasis added). In order to test compliance with the sound recording performance complement, the report of use must contain performance information in time-sequenced order by channel so that "any 3-hour period" can be measured on a rolling basis. See id.

As the Copyright Office has proposed in the NPRM, the Channel Name for an AM or FM radio station should be the Federal Communications Commission facility identification number of the broadcast station that is transmitted and the band designation (e.g., WABC-AM). NPRM, 67 Fed. Reg. 5761, 5766. The Channel Name for all other

transmissions should be the service's name for such channel (e.g., "80s Rock," "Celtic," "Folk"); "provided that if a program is generated as a random list of sound recordings from a predetermined list, the channel or program must be a unique identifier differentiating each user's randomized playlist from all other users' randomized playlists." Id. The Channel Name is already required under the Original Determination. See Original Determination, 63 Fed. Reg. at 34,296.

The Type of Program field is needed to ensure compliance with certain statutory provisions that establish duration requirements for particular programming. For example, an archived program must be at least 5 hours in duration and may not be made available for a period exceeding 2 weeks. See 17 U.S.C. § 114(d)(2)(C)(iii)(I)-(II). A continuous program may not be less than 3 hours in duration. See id. § 114(d)(2)(C)(iii)(III). If the uniform report of use did not identify the Type of Program, then a copyright owner could not ensure a service's compliance with this aspect of the statutory license.

RIAA proposes the following four categories for Type of Program:

Program Code	Description
A	for "Archived Programs" as defined in 17 U.S.C.
	§ 114(j)(2)
L	for "Looped" if the program is a "Continuous Program" as
	defined in 17 U.S.C. § 114(j)(4)
PS	for "Prescheduled" if the program is an identifiable
	program transmitted at times that have been publicly
	announced in advance as defined in 17 U.S.C. §
	114(d)(2)(C)(iii)(IV).
$O_{11}$	for "All Other Programming" that is not Archived,
	Looped or Prescheduled.

<sup>&</sup>lt;sup>11</sup> RIAA no longer recommends the use of "Live" as a Program Category. Such a definition may cause confusion among "live programming" (e.g., concert performances) and "live" transmissions (e.g., simulcasts of over-the-air AM or FM broadcasts or transmissions of programming created on the fly by an eligible nonsubscription transmission service).

NPRM, 67 Fed. Reg. at 5766.

The Influence Indicator field is needed because certain services provide the user with an ability to skip forward through a playlist at the user's sole discretion. Although RIAA believes that the use of a "skip" feature may render certain services interactive and, therefore, ineligible for the statutory license, a limited skip feature may eventually be determined to be eligible for the statutory license. If such services are determined to be eligible for the statutory license subject to certain conditions, then copyright owners will need to know which services offer a skip feature and whether those required conditions are satisfied.

RIAA proposes the following two categories for Influence Indicator:

Influence Indicator Code	Description
NUI	"Non-user influenced" if the program is a continuous stream of sound recordings on a particular channel that may not be influenced by the user in any way (e.g., through the use of a skip button)
UI	"User-influenced" if a specific user may determine the duration of the transmission of sound recordings on a particular channel (e.g., through the use of a skip button)

The "Genre" field (proposed Section 201.36(e)(1)(iv)) provides assistance in distinguishing among different sound recording copyright owners with the same name that own different repertoire. For example, "Spring Hill Music" is the name shared by at least two record labels. One Spring Hill Music is located in Tennessee and the other one is located in Colorado. Spring Hill Music (Tennessee) owns southern gospel repertoire while Spring Hill Music (Colorado) owns world, classical and new age repertoire. Receiving the Genre designation would be useful in situations where there is confusion as to whether one or the other similarly named record labels is entitled to royalty payment.

The Genre designation is not intended to be an objective designation attached to a particular sound recording. Rather, it is intended to be the designation that a service gives to the particular channel of music on which the sound recording is transmitted.

## 2. Information Regarding The Transmissions Of Sound Recordings (RIAA Proposed 37 C.F.R. § 201.36(e)(1)(vii)-(viii))

There are two data fields in the proposed uniform report of performances regarding the transmissions of sound recordings. These are the "Start Date and Time of the Sound Recording's Transmission" (proposed Section 201.36(e)(1)(vii)) and the "Total Number of Performances" (proposed Section 201.36(e)(1)(viii)).

The Start Date and Time of the Sound Recording's Transmission is essential to provide copyright owners with relevant information for ensuring compliance with the sound recording performance complement, as each 3-hour rolling period for a channel needs date and time reference points. The Start Date and Time of the Sound Recording's Transmission may also be used by collecting entities, subject to the consent of its members or clients, for distribution purposes when the audience size is not reported. The members may, for example, decide to weight performances based upon the time of day that the transmission is made, with performances during the day being weighted more heavily than overnight performances. Such a weighting could not be applied to the royalties due unknown or unaffiliated copyright owners, but the regulations adopted in the Webcaster CARP, for example, permit such weighting for distributions among members of a collecting entity. See CARP Report, Appendix B, § 3(f).

Providing such information does not create a material burden for services. For example, most radio stations and webcasters program channels using scheduling software. Some scheduling software will permit programs to be pre-programmed (e.g., a

service can select which 45 sound recordings it wants to transmit over a 3-hour period) while other software permits programming to be created on the fly from a finite universe of sound recordings (e.g., where a user initiates a stream on a channel and the approximately 15 songs delivered to the user during an hour are chosen from a universe of 200 songs). When programming is scheduled, the software determines the date and time sequence of the sound recordings, and such information can then be reported on the uniform report of performances. If the software does not record the pre-determined date and time of a transmission, an alternative is to use a service's computer server logs, which record the start date and time of transmissions. Computer server logs can also record the date and time of transmissions made on a pre-programmed service and will provide a back-up reporting system to the scheduling software. The Start Date and Time of the Sound Recording's Transmission is already required under the Original Determination, albeit in two separate fields. See Original Determination, 63 Fed. Reg. at 34,297.

The Total Number of Performances made by a service is necessary for ensuring that services properly account for their use of sound recordings under the rates and terms finally adopted by the Librarian (e.g., Webcaster CARP decision requiring eligible nonsubscription transmission services to pay a royalty for the transmission of all or any portion of a sound recording) and for distributing royalties according to usage. The Total Number of Performances should be identical to the number of performances reported on a statement of account, where royalties are calculated on a per performance basis.

The Total Number of Performances is captured in the service's server logs. Each time a user initiates a transmission from a service, it is logged on the server transmitting

the stream. See, e.g., supra note 8. The server log will also record the duration of the connection by the unique user as the song file is being transmitted. For purposes of the uniform report of performances, the service need only identify how many users were connected during the transmission of each sound recording, provided that a start date and time is provided for the initial transmission in instances where multiple users receive simultaneous transmissions of the same sound recording on the same channel. The total number of performances would be the cumulative number of separate connections made to end users, regardless of the duration of an end user's connection or the starting point of the transmission. Therefore, if 20 users were connected at the start of a sound recording and 10 new users connected midway through the transmission of that sound recording, then the total number of performances reported for that sound recording would be 30, even if some of the original 20 users terminated their transmission stream before the completion of the sound recording. Where there are no end user's receiving transmissions of a sound recording but the uniform report of performances contains entries for all sound recordings scheduled to be performed during a given time period (e.g., on a continuous program or on a simulcast of an over-the-air AM or FM broadcast), the Total Number of Performances would be reported as "zero" (0).

In the case where a service utilizes transmission technologies that are incapable of recording instances of user sessions (e.g., preexisting subscription services making broadcast-type transmissions that are available to all users without the user having to initiate a specific transmission) and such service is not required to pay a royalty for each transmission of any portion of a sound recording to a user, then only one (1) "performance" for each sound recording's transmission on a channel would be reported.

3. Information Necessary For Identifying Each Unique Sound Recording (RIAA Proposed Section 37 C.F.R. § 201.36(e)(1)(ix)-(xviii))

The remaining data fields in RIAA's proposed uniform report of performances, proposed Sections 201.36(e)(1)(ix)-(xviii), are needed to permit a collecting entity to identify and pay the copyright owners and performers who have earned the statutory royalties and permit a copyright owner or its agent to ensure a service's compliance with the sound recording performance complement.

The sound recording performance complement places limitations on the number of sound recordings by a particular artist or from a given album that may be transmitted on a particular channel during a 3-hour period. Statutory licensees as well as certain exempt services are required to comply with the programming limitations in the sound recording performance complement. 17 U.S.C. §§ 114(d)(1)(C)(iv), (d)(2)(C)(i).

Therefore, in order to ensure compliance with the sound recording performance complement, copyright owners need to know the "Artist Name" (proposed Section 201.36(e)(1)(ix)), the "Sound Recording Title" (proposed Section 201.36(e)(1)(x)), and the "Album Title" (proposed Section 201.36(e)(1)(xiv)) for the sound recording transmitted to users. Providing this information cannot be presumed to place any extra burden on a service as it is already required under the statutory license to display in textual data, the artist name, album title and sound recording title during the transmission of the sound recording. See 17 U.S.C. § 114(d)(2)(C)(ix). This information is also already required under the Original Determination. See Original Determination, 63 Fed. Reg. at 34,297. As services will have recorded this information in some database to

permit the display of such information during transmission<sup>12</sup>, such information is easily reportable to collecting entities.

The provision of only these three fields – Artist Name, Sound Recording Title and Album Title – are, however, insufficient by themselves for allocating royalties among copyright owners and performers. As such, RIAA has proposed additional data fields on the uniform report of performances that will permit a collecting entity to distinguish each sound recording as well as identify each copyright owner and performer entitled to receive royalties for the performance of a given sound recording. These fields include the "International Standard Recording Code" ("ISRC") (proposed Section 201.36(e)(1)(xii)), the "Track Label (P)-Line" (proposed Section 201.36(e)(1)(xiii)), the "Duration of Sound Recording" (proposed Section 201.36(e)(1)(xiii)), the "Marketing Label" (proposed Section 201.36(e)(1)(xvi)), the "Universal Product Code" ("UPC") (proposed Section 201.36(e)(1)(xvii)) and the "Release Year" (proposed Section 201.36(e)(1)(xviii)). Each of these fields is described below.

The ISRC is the unique identifier for sound recordings, identifying each version of a sound recording. It functions much like a social security number does for a person. Various types of information for a particular sound recording can be obtained by using this unique identifier. Software currently exists to read the ISRC that is embedded in

<sup>12</sup> The obligation to display the title of the sound recording, the name of the featured artist and the title of the album is not required in the "case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission." 17 U.S.C. § 114(d)(2)(C)(ix) (emphasis added). This limited exemption would not apply to terrestrial broadcast stations that simulcast their own signal over the Internet. In addition, for services offering retransmissions of terrestrial broadcast signals under contract, such services should require in a contract that the terrestrial broadcast station provide the service with the data needed for completion of the uniform report of use even if such data need not be displayed during the retransmission.

promotional and commercially released product. The ISRC can be plugged into a sound recording database, should such a database be made available commercially, to obtain the correct copyright owner and recording artist(s) entitled to receive distributions of statutory royalties. As the Copyright Office noted in the Original Determination, the ISRC, "when embedded in sound recordings, facilitates automatic identification and royalty administration worldwide." Original Determination, 63 Fed. Reg. at 34,289, 34,294.

The Track Label (P)-Line is the copyright owner information for an individual sound recording that can be found on the backside of the label packaging after the (P)-Line symbol (P). If the album is a compilation (e.g., a greatest hits release, a Broadway show album or a movie soundtrack), the Track Label (P)-Line information can be found inside the label package insert following the listing of each sound recording. See, e.g., column (xii) in Exhibits F-5b, -6b, -9b (examples of compilation albums containing different Track Label (P)-Line information for individual sound recordings). The copyright owner listed on the Track Label (P)-Line is generally the entity entitled to royalties for the public performance of the sound recording. The "recording label" is already required under the Original Determination. See Original Determination at 34,297.

The Duration of the Sound Recording is the total recorded time of that sound recording as identified on the label packaging and which pertains to the version being used by the service. This field is an objective number that should be constant regardless of the transmission time of all or any portion of the sound recording to a user. This

number helps distinguish among remixes of the same sound recording by the same artist (e.g., dance mixes). See, e.g., column (xiii) in Exhibits F-2, -8, -9b, -10, G-1, -2, -3, -4.

The Marketing Label is the name of the company that markets the album (e.g., a compact disc, audio cassette, LP, etc.) on which a particular sound recording may be found. See, e.g., column (xv) in Exhibits F-1, -2, -3, G-1, -2, -3, H-1b, -2b. In many cases, the Marketing Label name will be the same company shown on the Track Label (P)-Line. However, for compilation albums, the Track Label (P)-Line owner and the Marketing Label are often different. See, e.g., columns (xv) and (xii) in Exhibit F-6a, -6b, -9a, -9b. The "recording label" is already required under the Original Determination. See Original Determination at 34,297.

The Catalog Number is the unique number assigned by a particular record label to an album, as opposed to the particular sound recording on the album, for ordering and inventory management purposes. It can be found on the back or spine of the album label packaging. See, e.g., column (xvi) in Exhibits F-1, -2, -9a, -10, G-1, -7, -9, -10b, H-1b, -2b. Typically, the catalog number contains some portion of the UPC, described in the following paragraph. A record label may use the Catalog Number as an internal reference source (e.g., to track royalties, allocate revenues, etc.), whereas the UPC is a universal identifier. The Catalog Number is already required under the Original Determination. See Original Determination at 34,297.

The UPC is a 12-digit numeric identification code that is placed on product intended for retail sale and is read by automated scanning devices (i.e., the "bar code" number on a product). Unlike an ISRC, which is unique to a particular sound recording, a UPC is unique to a particular product (e.g., a CD, cassette, LP). For audio products, the

UPC contains detailed information such as the manufacturer number, the product selection number and the type of configuration. It can be found on the back of the album label packaging. See, e.g., column (xvii) in Exhibits F-1, -2, -3, -5a, -6a, G-2, -4, H-1b, -2b.

The Release Year is the year the album was first released commercially for public distribution as identified on the backside of the label packaging after the (P)-Line symbol. See, e.g., column (xviii) in Exhibits F-1, -2, -4, -6a, G-1, -2, -3, -4, -5, H-1b, -2b. If multiple release years are evident, the service should report the most current year.

The data elements requested by the RIAA are intended to permit a collecting entity to distinguish among the tens of thousands of sound recordings that have been released in the United States. When combined in a single entry, the proposed data fields will facilitate the efficient and prompt distribution of statutory royalties. For example, the Album Title, Release Year, ISRC and UPC together provide information that enables a collecting entity to distinguish among sound recordings by the same artist that may appear on different album releases. In such an instance, different copyright owners and nonfeatured performers may be entitled to the statutory royalties paid for the use of those sound recordings. See Exhibit J (printout from All Music Guide website of a number of albums containing the song "Does Anybody Really Know What Time It Is," including multiple performances by the featured artist Chicago.).

Receiving Release Year information assists in differentiating copyright ownership when the same sound recording by the same artist is released on a new album or appears on a reissue of an existing album. In these cases, ownership of sound recordings may have changed hands over the years and different copyright owners may be entitled to

statutory royalties depending upon the album from which the sound recording is taken. The Release Year also facilitates the differentiation among similarly titled albums. In addition, more and more artists – whose careers have spanned decades – are acquiring the copyright to their own recordings. Providing the Release Year, as well as the UPC and Catalog Number, provides invaluable information to discern current ownership and entitlement to statutory royalties. As noted above, this information is available on the physical product, is available to the service making the transmission and should be reported on RIAA's proposed uniform report of performances.

The Artist Name, Marketing Label and Track Label (P)-Line are used to ascertain the copyright owners and performers entitled to statutory royalties. As noted above, such information is particularly important for sound recordings that are taken from compilation albums, where each sound recording may have a different Track Label (P)-Line owner and the Marketing Label may be a separate entity entirely. See, e.g., columns (xv) and (xii) in Exhibit F-6a, -6b, -9a, -9b.

The independent administrator(s) appointed to allocate royalties to nonfeatured musicians and vocalists also require detailed information on each sound recording performed by a service in order to properly allocate royalties among nonfeatured performers. The current independent administrator is building a database to match featured performance information with information on background musicians and vocalists. Therefore, the independent administrator(s) will also be faced with the problems of distinguishing among the many similarly named sound recordings, the different releases of the same sound recordings and the different performances by the same artist of the same song. It is not uncommon for an artist to record a sound recording

with studio musicians but then to play concerts with different musicians. If a concert recording is made and then released, the performance of the same titled sound recording by the same artist may trigger different royalty payments to different nonfeatured performers. Similarly, a featured artist may record the same sound recording multiple times for different albums, with each performance containing different nonfeatured performers. Background performers are entitled to performance royalties. Therefore, services must report information that assists the independent administrator(s) in identifying the various background performers entitled to performance royalties. The information requested in the RIAA uniform report of performances will assist the independent administrator(s) in compensating the nonfeatured performers entitled to payment.

## G. Ephemeral Phonorecord Logs

The ephemeral phonorecord log proposed by the Copyright Office, as modified by the RIAA in these proposed regulations (see Exhibit A), relies upon the same data elements set forth in RIAA's uniform report of performances. Cf. Exhibits C and D columns (ix)-(xviii). Separate data fields are included in order to track when an ephemeral phonorecord is first made, how many ephemeral phonorecords are made, when the first transmission from that ephemeral phonorecord occurs and when the ephemeral phonorecord is destroyed.

An ephemeral phonorecord log is needed for the allocation of royalties that are to be paid under the Section 112 license. As copyright owners may decide to allocate royalties based upon the number of reproductions made by a service rather than using the proxy of performances made by a service, they need the information on the number of reproductions created separate and apart from the number of performances. This is true

even though the payment for ephemeral reproductions may be tied to the payment for performances.

All of the information on the ephemeral phonorecord log is also needed to ensure that services comply with the statutory requirement to destroy ephemeral phonorecords "within 6 months from the date the sound recording was first transmitted to the public using the phonorecord." 17 U.S.C. § 112(e)(1)(C). Without detailed reporting logs on the creation and destruction of ephemeral phonorecords, copyright owners would be unable to ensure that a service has complied with a fundamental requirement of the statutory license. In fact, failure to require services to provide detailed ephemeral phonorecord logs will most likely ensure that no service will comply with the obligation to destroy ephemeral phonorecords within the 6-month period. And, if services believe that they can avoid having to destroy their ephemeral phonorecords, individual copyright owners will be deprived of their right to grant exclusive licenses that may waive the destruction requirement.

The layout of the proposed ephemeral phonorecord log is intended to be similar to the proposed uniform report of performances. For this reason, certain fields have been identified as "[Reserved]" so that sound recording and album information would be reported in the same fields on the ephemeral phonorecord log and the uniform report of performances.

# H. Final Regulations Should Be Issued Expeditiously To Avoid Any Further Harm To Copyright Owners and Performers

The delay in adopting regulations for existing services may already have deprived copyright owners and performers of full compensation for the exploitation of their works. For example, the CARP Report recommends that certain eligible nonsubscription

transmission services be permitted to estimate the number of performances they made during the period October 28, 1998 through the thirty-day period following the Librarian's final order in the Webcaster CARP. See CARP Report (Interim Public Version) at 110. Where services have offered skip features or not included audio advertisements in their transmissions, the estimated number of performances used to calculate past royalty obligations will likely result in an underpayment of statutory royalties. Such underpayment would be directly attributable to a service's failure to retain and provide data of past transmission activity. Copyright owners and performers should not be deprived of proper compensation for past or future performances because services neglected to retain historical data or worse yet, are permitted to report less than complete and accurate data that is critical to the proper allocation of statutory royalties.

The Copyright Office should adopt final regulations for all services as expeditiously as possible. Although services have had constructive notice since June 24, 1998, of the types of information they would have to report, concluding this recordkeeping proceeding in a timely manner will eliminate any doubt about a service's reporting obligations. Prompt adoption of final regulations will also ensure that collecting entities can develop royalty collection and distribution systems that will allow them to distribute expeditiously royalties to the copyright owners and performers entitled

<sup>&</sup>lt;sup>13</sup> The CARP Report provides that "[f]or the period up to the effective date of the rates and terms prescribed herein, and for 30 days thereafter, the statutory licensee <u>may</u> estimate its total number of performances <u>if the actual number is not available</u>." CARP Report (Interim Public Version) at 110 (emphasis added). The ability to estimate historical performances is conditioned upon a service not having actual performance data. The Copyright Office should make clear in its final regulations that where raw server logs are available to a statutory licensee – as they should have been in order for a service to qualify for the statutory license and following the Original Determination – the licensee should be required to mine those server logs to provide copyright owners with accurate notice of use of sound recordings.

to such royalties. Finally, the Copyright Office should not permit this rulemaking to delay the payment of royalties by eligible nonsubscription transmission services and the accurate calculation of royalty payments based upon the transmission of any portion of a sound recording to a recipient. See 17 U.S.C. § 114(f)(4)(C).

#### V. CONCLUSION

Services making ephemeral phonorecords or digital audio transmissions of sound recordings are benefiting from a statutory license (i.e., not having to negotiate license agreements with thousands of copyright owners) or a statutory exemption. In exchange for this substantial benefit, services must satisfy certain requirements. These requirements include, among others, the obligation to: (1) provide copyright owners with notice of use of their sound recordings; (2) comply with the sound recording performance complement; (3) comply with time limitations for certain archived and continuous programs; and (4) destroy ephemeral phonorecords within the 6-month period following the first transmission made from the ephemeral phonorecord. These requirements were enacted to ensure that copyright owners and performers are compensated for the use of their works and to minimize the devastating effect that these reproductions or performances, which copyright owners and performers have no control over, may have on their livelihood.

As noted above, there are two principal purposes for the notice and recordkeeping requirements. First, the reported information must provide sufficient detail so that royalties may be distributed to the copyright owners and performers who have earned such royalties. Second, a service must report information that permits a copyright owner to ensure that a service is complying with all statutory requirements. The regulations

proposed by the Copyright Office, as amended by the RIAA herein, would accomplish these dual purposes.

RIAA requests only the information it needs to distribute the royalties to the appropriate copyright owners and performers and determine if the other statutory requirements are being satisfied by a service. The requested information is almost always in the sole possession of the services, can be recorded by the services in the regular course of business, and will not create a material burden for the services. On the other hand, it is frequently impossible and always economically infeasible for copyright owners to monitor all channels of programming offered by all services in order to collect the information needed for the accurate distribution of statutory royalties, ensure compliance with the sound recording performance complement or monitor the destruction requirement for ephemeral phonorecords. To be refused the requested information would be tantamount to a denial of the royalties and the other statutory protections established by Congress for copyright owners and performers, such as the sound recording performance complement. If a collective has to expend most of the royalties it collects trying to identify who is entitled to the royalties, then the statutory intent is frustrated. Moreover, the sound recording performance complement requirement is vitiated if copyright owners are denied the very information they need to determine compliance.

As noted above, the process of distributing statutory royalties to copyright owners and performers is complex, time consuming and expensive. Yet SoundExchange stepped forward to provide the service of collecting and distributing statutory royalties even though it had no obligation to do so. Copyright owners could have insisted upon receiving distributions directly from each service, as is their right. However,

SoundExchange cannot satisfy its obligation to serve as an agent for copyright owners without comprehensive data from services. Only with such data can a collective properly allocate royalties among the few thousand copyright owners and tens of thousands of featured artists and nonfeatured musicians and vocalists entitled to such royalties.

Services cannot satisfy their statutory obligations by merely paying royalties and providing minimal information. Royalties that cannot be distributed have little value and statutory rights that cannot be enforced because of a lack of information result in no rights at all.

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For the reasons set forth above, RIAA respectfully requests that the Copyright

Office adopt the regulations set forth in Exhibit A hereto.

Respectfully submitted,

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April 5, 2002

#### Before the COPYRIGHT OFFICE LIBRARY OF CONGRESS

Washington, D.C.

	)	
In Re:	)	
Notice and Recordkeeping for Use of Sound Recordings Under Statutory License	) ) ) )	Docket No. RM 2002-1H

## COMMENTS OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. ("SoundExchange"), a nonprofit organization incorporated in the State of Delaware and jointly controlled by representatives of sound recording copyright owners and performers through an eighteen-member board of directors, on behalf of itself and the copyright owners and performers on whose behalf it collects and distributes statutory royalties, respectfully submits these Comments in response to the Copyright Office's Notice of Proposed Rulemaking for Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1H, published in the Federal Register on April 27, 2005. 70 Fed. Reg. 21704 (the "April 27th NPRM").

SoundExchange represents not only the interests of those sound recording copyright owners<sup>1</sup> and featured performers who have specifically authorized SoundExchange to collect and distribute royalties on their behalf, but also those unaffiliated sound recording copyright owners and featured performers who are entitled

<sup>&</sup>lt;sup>1</sup> The sound recording copyright owners who authorize SoundExchange to represent their interests do so on a non-exclusive basis. Each sound recording copyright owner retains the right to license directly any copyrighted sound recordings they own or control.

to a portion of the royalties paid by services claiming the benefits of the statutory licenses. As such, SoundExchange represents the interests of the overwhelming majority – over 99% – of all performers and copyright owners entitled to statutory royalties.

#### I. INTRODUCTION

Recordkeeping regulations are an integral component of the statutory license regime. When Congress granted certain noninteractive services the right to transmit any sound recording lawfully released in the United States pursuant to a statutory license, it deprived copyright owners of the right to withhold a license. In exchange for the statutory license, however, licensees had to agree to certain conditions. These included, *inter alia*, filing a notice of use of sound recordings with the Copyright Office prior to the making of any transmissions, the payment of royalty fees, the completion of a statement of account to calculate royalty fees payable, if any, and the delivery of reports of use.<sup>2</sup>

For several years statutory licensees have known the royalty fees they are required to pay. See Final Rule and Order in Docket No. 96-5 CARP DSTRA, 63 Fed. Reg. 25394 (May 8, 1998) (codified at 37 C.F.R. Part 260); Final Rule and Order in Docket No. 2000-9 CARP DTRA 1&2 (July 8, 2002) (codified at 37 C.F.R. Part 261); Final Rule in Docket Nos. 2002-1 CARP DTRA3 and 2001-2 CARP DTNSRA (Feb. 6, 2004) (codified at 37 C.F.R. Part 262). What licensees have not known, however, is how they are to provide copyright owners and performers with reasonable notice of the use of sound recordings transmitted under the Section 114 statutory license. Section 114(f)(4)(A) requires the "[t]he Librarian of Congress . . . [to] establish requirements by

<sup>&</sup>lt;sup>2</sup> A report of use of sound recordings provides identification information on sound recordings transmitted pursuant to the statutory license and the volume of activity under the license (e.g., the number of performances or Aggregate Tuning Hours, a method of measuring the amount of time sound recordings were streamed to recipients).

which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings." 17 U.S.C. § 114(f)(4)(A) (emphasis added).<sup>3</sup>

Statutory licensees could be required to provide each copyright owner whose works are transmitted by the service with direct notice of use under a plain reading of the statutory reporting requirement. As an accommodation to statutory licensees, however, copyright owners and performers — at their own considerable expense — created SoundExchange to handle the collection and distribution of statutory royalties. By undertaking this activity, copyright owners and performers have relieved licensees of a tremendous burden and reduced the royalties they receive, as the deduction of costs from collected royalties reduces the amount available for distribution. This burden shifting — from licensees to copyright owners and performers — should be taken into account in the adoption of final regulations. Statutory licensees should not be permitted to increase further the costs for copyright owners and performers when it is the licensees who are benefiting from SoundExchange's efforts to handle the allocation and distribution of all statutory royalties.

SoundExchange appreciates the Copyright Office's efforts to develop comprehensive and workable notice and recordkeeping requirements and the publication of proposed regulations governing how statutory licensees will be required to deliver reports of use. SoundExchange developed its proposal for format and delivery

<sup>&</sup>lt;sup>3</sup> Section 114(f)(4)(A) was amended by the Copyright Royalty Distribution and Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (Nov. 30, 2004). Section 5(c)(4) of the Act inserted "Copyright Royalty Judges" in each place in Section 114(f)(4)(A) where the "Librarian of Congress" appeared. 118 Stat. at 2364.

specifications with the input of several statutory licensees, and a growing number of services are or soon will be providing voluntarily their reports of use under those specifications. In light of marketplace acceptance of the interim regulations adopted by the Copyright Office on March 11, 2004, Interim Regulations for Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1E, 69 Fed. Reg. 11515 (the "Interim Regulations") and SoundExchange's development of delivery requirements with input from statutory licensees, SoundExchange believes it would be counterproductive and a step backwards for services to re-litigate these issues.

As the Copyright Office's jurisdiction over recordkeeping ends on May 31, 2005, it is worth noting that many eligible nonsubscription services and new subscription services, among others, have never been obligated to deliver reports of use to SoundExchange even though the Interim Regulations obligate licensees to retain information on their transmissions under the statutory license. See Interim Regulations, 69 Fed. Reg. at 11517 ("The interim regulations announced today apply on a prospective basis, meaning that they apply to uses of sound recordings under the section 112 and 114 licenses occurring on and after the effective date announced above."). Without reports of use or the approval for the use of a distribution proxy for any reporting period after March 31, 2004, however, SoundExchange will be unable to distribute the millions of dollars in royalties that have been collected since that time. SoundExchange hopes that the assignment of responsibility for adopting format and delivery regulations to the Copyright Royalty Judges will not unduly delay the adoption of final regulations that are necessary to distribute statutory royalties paid for any period following March 31, 2004.

# II. BACKGROUND ON NOTICE AND RECORDKEEPING PROCEEDING

On May 24, 2001, SoundExchange, then an unincorporated division of the Recording Industry Association of America, Inc. ("RIAA"), petitioned the Copyright Office to establish notice and recordkeeping requirements for the use of sound recordings in certain digital audio services. See RIAA Petition for Rulemaking to Establish Notice and Recordkeeping Requirements for the Use of Sound Recordings in Certain Digital Audio Services. The Copyright Office commenced a rulemaking proceeding to establish "the requirements for giving copyright owners reasonable notice of the use of their works for sound recordings under statutory license and for how records of use shall be kept and made available to copyright owners" on February 7, 2002. Copyright Office Notice of Proposed Rulemaking for Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002. 67 Fed. Reg. 5761 (Feb. 7, 2002). Nearly forty parties filed comments in response to the notice of proposed rulemaking. See Comments of the RIAA in Docket No. RM 2002-1A (Apr. 5, 2002). Over twenty parties filed reply comments to the original comments. See Reply Comments of the RIAA in Docket No. RM 2002-1 (Apr. 26, 2005).

On September 23, 2002, the Copyright Office published a notice requesting written proposals governing data format and delivery for recordkeeping requirements (i.e., the mechanics of how statutory licensees would provide reports of use). Copyright Office Notice Requesting Written Proposals and Announcing Status Conference for Notice and Recordkeeping for Use of Sound Recordings Under Statutory Licenses, Docket No. RM 2002-1B, 67 Fed. Reg. 59573 (Sep. 23, 2002). SoundExchange filed

<sup>&</sup>lt;sup>4</sup> As noted above, SoundExchange was originally an unincorporated division of the RIAA. RIAA's comments in the rulemaking were filed, in part, on behalf of SoundExchange. See Comments of RIAA at 1 (Apr. 5, 2002).

comments in response to the notice on September 30, 2002. A copy of those comments is attached hereto as Exhibit A. In Exhibit A to the September 30 comments<sup>5</sup>, SoundExchange submitted detailed specifications proposing how statutory licensees should deliver electronic copies of reports of use. The Exhibit, titled "File and Reports of Use Delivery Specifications," included proposals for the delivery of reports, file content specifications, and acknowledgement procedures. Many of the proposals set forth in that Exhibit A were incorporated into the Copyright Office's April 27<sup>th</sup> NPRM.

On October 24, 2002, the General Counsel of the Copyright Office sent a letter to SoundExchange requesting clarification of a comment made in footnote six of SoundExchange's September 30, 2002, comments. The Copyright Office wanted to know how SoundExchange could use Aggregate Tuning Hour ("ATH") data on a channel-by-channel basis along with separate playlists for each such channel to estimate the number of performances for each sound recording for distribution purposes. SoundExchange responded in writing to the Copyright Office's inquiry on October 28, 2002.

On October 8, 2003, the Copyright Office issued a Notice of Inquiry seeking comment on "the adoption of regulations for records of use of sound recordings performed pursuant to the statutory license for public performances of sound recordings by means of digital audio transmissions between October 28, 1998, and the effective date of soon-to-be-announced interim regulations." Notice of Inquiry in Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM

<sup>&</sup>lt;sup>5</sup> SoundExchange filed a corrected copy of Exhibit A with the Copyright Office on October 3, 2002. The Exhibit A to the September 30, 2002, filing, as corrected on October 3, 2002, is not included as an Exhibit to these Comments in order to avoid confusion as that document is no longer current with Copyright Office regulations.

2002-1D, 68 Fed. Reg. 58054 (Oct. 8, 2003). Because statutory licensees had largely failed to maintain reports of use prior to the adoption of recordkeeping regulations, the Copyright Office sought comment on how SoundExchange should be permitted to distribute royalties for periods prior to the adoption of prospective recordkeeping regulations.

SoundExchange and several other parties filed comments in response to the Notice of Inquiry. See Comments of SoundExchange, Inc. in Docket No. RM 2002-1D (Nov. 24, 2003). Several parties filed reply comments in response to the initial comments. See Reply Comments of SoundExchange, Inc. in Docket No. RM 2002-1D (Dec. 22, 2003).

On March 11, 2004, the Copyright Office issued interim regulations establishing the data elements that services would have to report to SoundExchange for the transmission of sound recordings under the statutory license. Interim Regulations in Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1E, 69 Fed. Reg. 11515 (Mar. 11, 2004) (the "Interim Regulations") (codified at 37 C.F.R. Part 270). The Interim Regulations require services to report, *interalia*, (i) the featured artist; (ii) the sound recording title; (iii) the International Standard Recording Code ("ISRC") or, alternatively to the ISRC, the (x) album title; and (y) marketing label. See Interim Regulations, 69 Fed. Reg. at 11530 (codified at 37 C.F.R. § 270.3(c)(2)(iii)-(v)).

On July 13, 2004, the Copyright Office published a Notice of Proposed

Rulemaking inviting comments on its proposal to allow SoundExchange to distribute the royalties paid by nonsubscription transmission services, preexisting satellite digital audio

radio services, new subscription services, and business establishment services during any portion of the period October 28, 1998, through March 31, 2004, using the proxy of the reports of use filed by the three preexisting subscription services for those same periods. Notice of Proposed Rulemaking in Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1F, 69 Fed. Reg. 42007 (July 13, 2004). The parties filing comments in response to this notice of proposed rulemaking generally supported the use of the proposed proxy. See Comments of SoundExchange, Inc. in Docket No. RM 2002-1F (Aug. 12, 2004).

On September 30, 2004, the Copyright Office published a final rule authorizing SoundExchange to distribute royalties paid for the period October 28, 1998, through March 31, 2004, using the reports of use filed by the three preexisting subscription services as a proxy. Final Rule in Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1G, 69 Fed. Reg. 58261 (Sep. 30, 2004).

Throughout this rulemaking, SoundExchange has sought the adoption of regulations that would require statutory licensees to provide comprehensive reports of use detailing each sound recording transmitted under statutory license or under the exemption set forth in 17 U.S.C. § 114(d)(1)(C)(iv) (so-called "census reporting") so that the copyright owners of and the performers on transmitted sound recordings could be paid for the use of those recordings. The Copyright Office, when it adopted interim regulations specifying notice and recordkeeping requirements, rejected SoundExchange's request for census reporting, at least initially. See Interim Regulations, 69 Fed. Reg. at 11522 (Mar. 11, 2004). According to the Copyright Office, "[a]lthough the ultimate goal

is to require comprehensive reporting on each performance a webcaster makes, that goal is not achievable at this time. Therefore, the regulations announced today will not require year-round reporting, but only reporting for certain periods during the year, and the information that webcasters must provide will be less comprehensive than copyright owners desire." 6 Id. (emphasis added). In adopting sample reporting, however, the Copyright Office acknowledged that there would be an imperfect distribution of royalties depriving both copyright owners and performers of certain royalties. Id.

SoundExchange believes that the sample reporting permitted under the Interim Regulations may result in the non-payment of royalties to over thirty percent of the performers entitled to such royalties. See Reply Comments of SoundExchange, Inc. in Docket No. RM 2002-1D at Exhibit A (Dec. 22, 2003). Excluding so many performers from the royalties to which they are entitled seems antithetical to the intent of the statutory license, and SoundExchange respectfully requests that any requirements that result in the exclusion of so many performers be corrected with the adoption of final regulations.

# III. DISCUSSION OF PROPOSED FORMAT AND DELIVERY SPECIFICATIONS

The Copyright Office has requested comments on a number of issues surrounding the mechanics of data reporting pursuant to the statutory licenses. SoundExchange responds to those questions and several other issues below.

#### A. Organizing and Formatting the Data

<sup>&</sup>lt;sup>6</sup> The Copyright Office stated in the Interim Regulations that "[o]nce final regulations are implemented, year-round census reporting is likely to be the standard measure rather than the periodic reporting that will now be permitted on an interim basis." 69 Fed. Reg. at 11526 (emphasis added).

## 1. <u>Electronic Delivery</u>

The Copyright Office has proposed that services be required to provide reports of use to SoundExchange in electronic form. April 27<sup>th</sup> NPRM, 70 Fed. Reg. at 21706. SoundExchange supports this proposal. The Copyright Office has noted that it would be "cumbersome, expensive, and of little or no value to the royalty distribution process" for SoundExchange to receive reports of use in anything other than electronic format. <u>Id</u>. We agree.

In order for SoundExchange to process the hundreds of millions of performances that are likely to be reported by statutory licensees, SoundExchange must be able to utilize automated, economical data processing systems that facilitate the accurate and efficient distribution of royalties. Without electronic delivery of reports of use, SoundExchange would have to enter manually all of the information contained in the hard-copy reports of use submitted by all statutory licensees. Entering approximately five separate data elements for each sound recording transmitted by each licensee would require SoundExchange to enter millions of data points per reporting period at an enormous cost. These costs would in turn result in fewer royalties being paid to copyright owners and performers as they would be covered by the royalties paid by statutory licensees.

In light of the extraordinary costs and burdens that would be imposed upon copyright owners and performers if services were permitted to deliver reports of use in hard copy rather than electronically, SoundExchange believes that statutory licensees must be required to deliver reports of use electronically.

# 2. <u>Use of a Spreadsheet</u>

The Copyright Office has proposed that statutory licensees be permitted to complete a report of use using a widely marketed electronic spreadsheet. April 27<sup>th</sup> NPRM, 70 Fed. Reg. at 21706. SoundExchange originally opposed the use of spreadsheets on three grounds: (1) spreadsheet data is not readily readable by Extraction, Transformation and Loading ("ETL") software and would therefore create an undue burden on SoundExchange to convert the spreadsheets into useable format; (2) proprietary spreadsheets may lock SoundExchange into proprietary software or a version of software that may not be supported in the future by the manufacturer, potentially requiring SoundExchange to support discontinued software; and (3) the size limitations for spreadsheets could result in the loss of data or the inaccurate recordation of data, and require the submission of multiple reports of use from a licensee for one reporting period. Comments of SoundExchange in Docket No. RM 2002-1B at 6 (Sep. 30, 2002).

SoundExchange interprets the April 27<sup>th</sup> NPRM as not permitting statutory
licensees to submit reports of use in a spreadsheet format. See 70 Fed. Reg. at 21706.

Rather, SoundExchange understands the Copyright Office to be proposing that
SoundExchange create templates for at least two popular spreadsheet programs,
Microsoft's Excel and Corel's Quattro Pro, that would enable statutory licensees to
record data elements for transmitted sound recordings using a spreadsheet, provided that
the licensee then convert the spreadsheet data into an American Standard Code for
Information Interchange ("ASCII") text file that could be submitted to SoundExchange
electronically. Id. If SoundExchange's understanding of the April 27<sup>th</sup> NPRM is correct,

then SoundExchange does not object to the proposal requiring SoundExchange to post two spreadsheet templates on its Web site.

Following the Copyright Office's publication of the April 27<sup>th</sup> NPRM,

SoundExchange contacted Microsoft to discuss the creation of a software macro for the currently supported release of Microsoft Excel spreadsheets that would facilitate the conversion of spreadsheet data into an ASCII text file. Microsoft has written the macro for SoundExchange and SoundExchange has posted a template spreadsheet file on its Web site. To access the template, a service should go to 

<a href="http://www.soundexchange.com/licensee\_home.html">http://www.soundexchange.com/licensee\_home.html</a> and click on the appropriate service category (e.g., "Commercial Webcasters/Simulcasters," "Noncommercial Webcasters/Simulcasters," "New Subscription Services," etc.) and then click on the link to "Reporting Requirements."

SoundExchange has not previously licensed or supported Corel's Quattro Pro but will license that software and work with Corel to develop a macro that will similarly enable a statutory licensee to use Quattro Pro to record the data elements required under regulations and then convert the spreadsheet into an ASCII text file. Having never worked with Corel before, SoundExchange cannot make any assurances as to how quickly it may be able to obtain Corel's assistance but it does not foresee any significant delays in being able to develop and post a Quattro Pro template on the SoundExchange Web site.

SoundExchange agrees with the Copyright Office statement that services and not SoundExchange should be responsible for obtaining technical support for the use of spreadsheets. SoundExchange will work with licensees to ensure their prompt and

efficient delivery of reports of use, but it cannot accept an affirmative obligation to provide technical support for spreadsheet software that it neither manufactures nor maintains.

#### 3. Format Specifications

#### a. <u>Flexibility and Evolving Standards</u>

The Copyright Office has stated that there are no "universal methods of operation or uniform business standards" for the format and delivery specifications for reports of use. April 27<sup>th</sup> NPRM, 70 Fed. Reg. at 21706. While the Copyright Office's statement is correct, world-wide reporting standards are developing as a result of the demand by certain services for licenses to make global transmissions. In response to the demands of transmitting entities, the International Federation of the Phonographic Industry ("IFPI") has been facilitating the development of license protocols that would permit a collecting society in one country to license transmitting entities in that country to make transmissions into the territory of another signatory collecting society. This so-called "world-wide reciprocal agreement" will likely include standards for the electronic delivery of detailed reports of use of sound recordings to the collecting society granting a transmitting entity the right to make extra-territorial transmissions. These standards are likely to require census as opposed to sample reporting, detailed identification information per sound recording, and information on the territory of reception.

SoundExchange is participating in the effort to develop the world-wide reciprocal agreement so that U.S.-based webcasters will be able to make transmissions into foreign territories without risking liability for infringement. If SoundExchange does offer such licenses to U.S.-based webcasters (or non-U.S.-based webcasters who seek a license from

SoundExchange), then SoundExchange will likely be obligated to require reports of use consistent with the specifications established for the world-wide reciprocal agreement, which specifications will likely be more comprehensive than those established in the Interim Regulations or proposed in this notice of proposed rulemaking. SoundExchange is open to discussing the evolving international standards with any interested parties in the event they wish to develop reporting protocols that go beyond what is required under federal regulations.

# b. File Naming

SoundExchange agrees with the Copyright Office proposal that file names must be appropriately titled and contain the name of the service followed by a start and end date. Because the Copyright Office's Interim Regulations permit services to report two seven-day periods per calendar quarter, however, SoundExchange believes the dates to be used in a file name should be the dates of the actual period for which sound recording information is being provided versus the start and end date of the relevant calendar quarter. If a service does not report fourteen consecutive days within a calendar quarter, then SoundExchange requests that the service provide two separate reports of use per reporting period.

For example, if a service provided reporting information for the periods January 15-21, 2005, and March 7-13, 2005, then SoundExchange believes it would be insufficient for the service to name a file as "AcmeMusicCo01012004-31032004.txt." SoundExchange would instead request two files titled as follows:

AcmeMusicCo15012005-21012005.txt<sup>7</sup>

<sup>&</sup>lt;sup>7</sup> In the sample file name included in Section B.1 of the April 27<sup>th</sup> NPRM, the Copyright Office used the name AcmeMusicCo01102004-07012004.txt. SoundExchange notes that the date range in this file name is

## AcmeMusicCo07032005-13032005.txt

If regulations do not require a statutory licensee to identify the specific dates for which a report of use is being provided, then SoundExchange may have no way of knowing whether a service actually reported fourteen days of data per calendar quarter. If the report of use is titled for a specific week or two weeks, however, then SoundExchange may be able to verify the sufficiency of the report of use by extrapolating from the number of songs transmitted or the volume of usage (e.g., ATH compared to publicly available Total Time Spent Listening figures).

In suggesting that statutory licensees be permitted to provide two reports of use for a reporting period – where the service does not report two consecutive seven-day reporting periods in a calendar quarter – SoundExchange is amending its previous proposal that would limit a service to one report of use per reporting period. See April 27th NPRM, 70 Fed. Reg. at 21707 ("SoundExchange desires only one file per statutory license."). SoundExchange's request for one report of use per reporting period preceded the Copyright Office's adoption of the Interim Regulations, which permitted statutory licensees to report two periods of seven consecutive days for each calendar quarter. Interim Regulations, 69 Fed. Reg. at 11526 (codified at 37 C.F.R. 270.3(c)(3)). If licensees are permitted to submit two seven-day reporting periods that are not contiguous, then SoundExchange respectfully requests that file names include the start and end dates for the period for which sound recording information is being reported instead of the start and end date of the calendar quarter.

October 1, 2004 to January 7, 2004. We suspect that this incorrect date range resulted from the transposition of the one and the zero in the third and fourth places in the first date range. The correct date range is probably 01012004-07012004.

As a new matter, SoundExchange respectfully requests that statutory licensees be required to deliver a separate report of use for each transmission category<sup>8</sup> under which they operate (e.g., an eligible nonsubscription service and a new subscription service, or a preexisting satellite digital audio radio service and new subscription service). This proposal is necessary because statutory royalties paid by a service (and calculated on discrete statements of account) should be allocated according to the transmissions made pursuant to that category. Without multiple reports of use, however, SoundExchange would be unable to allocate properly the royalties paid per transmission category, even where the sound recordings transmitted under different categories varied greatly.

If a service is operating under multiple transmission categories, then the reports of use delivered by a service should indicate the transmission category in the file name.

This will prevent a service from giving multiple reports of use the same name if they are provided for identical seven- or fourteen-day reporting periods. SoundExchange proposes that the transmission category be identified in the file name after the date range, separated from the date range by an underscore (not a space), as follows:

AcmeMusicCo15012005-21012005\_H.txt

AcmeMusicCo07032005-13032005\_K.txt

SoundExchange is only requesting the identification of the transmission category in a file name where a service makes transmissions in more than one category so as not to burden services already providing reports of use without the transmission category code.

<sup>&</sup>lt;sup>8</sup> SoundExchange notes that the transmission categories established in the Interim Regulations do not include a transmission category for preexisting satellite digital audio radio services. <u>See</u> Interim Regulations, 69 Fed. Reg. at 11530 (codified at 37 C.F.R. § 270.3(c)(2)(ii)(A)-(K). This may be the result of SoundExchange and the preexisting satellite digital audio radio services asking the Copyright Office to abstain from adopting recordkeeping requirements for the satellite services, a request the Copyright Office rejected.

However, SoundExchange would prefer if all services reported the transmission category following the end date of the seven or fourteen consecutive day reporting period.

#### c. File Type

SoundExchange agrees with the proposal to require the delivery of files in ASCII format. As SoundExchange noted in its comments of September 30, 2002, "[t]he ASCII format has been in use since the early 1960s and is one of the most widely adopted formats for the reporting of alphanumeric data. Every computer operating system supports ASCII text files and nearly every database management system supports the import of ASCII text files." Comments of SoundExchange in Docket No. RM 2002-1B at 5 (Sep. 30, 2002).

SoundExchange has already invested millions of dollars in developing systems that process the reports of use in ASCII format provided by the three preexisting subscription services as well as many other licensees who are providing reports of use voluntarily or under mandatory, non-Copyright Office reporting requirements. If an alternative file type were permitted, then SoundExchange and the copyright owners and performers for whom it collects royalties could be required to spend additional sums to develop a second – and unnecessary – data processing system.

SoundExchange respectfully requests that regulations continue to require the delivery of reports of use in ASCII format.

#### d. <u>Delivery Mechanism</u>

As a proponent of permitting statutory licensees to elect one of several methods for delivering reports of use that best suits the licensee's particular needs and capabilities, SoundExchange supports the Copyright Office's proposal to give statutory licensees four

options for delivering reports of use: File Transfer Protocol ("FTP"), Electronic Mail ("e-mail"), Compact Disk-Read Only Memory ("CD-ROM"), and Floppy Diskette.

SoundExchange understands that some services may wish to deliver their reports of use in a method not proposed by the Copyright Office. Although SoundExchange does not support a regulatory expansion of the methods of delivery beyond the four proposed by the Copyright Office for cost reasons, SoundExchange invites statutory licensees to contact it to discuss alternative delivery methods with the understanding that SoundExchange will have sole discretion to decide whether non-mandatory delivery methods will be accepted and supported.

NPRM the Copyright Office mentions the delivery of data to more than one designated agent. See 70 Fed. Reg. at 21706 ("The Copyright Office is proposing four separate means for delivery of data to receiving and designated agents."); ("A report of use contained on a floppy diskette . . . should be delivered to the addresses identified for the receiving and designated agents."). Presently, SoundExchange is the only agent designated by the Copyright Office to distribute royalties paid under the Section 112 and Section 114 statutory licenses. If in the future multiple agents are designated by the Copyright Royalty Judges to distribute statutory royalties, then SoundExchange believes that statutory licensees must be required to deliver their reports of use directly to the receiving agent and each designated agent, and the receiving agent and each designated agent should have no obligation to provide any service's report of use to any other

designated agent. Requiring SoundExchange to deliver reports of use to another designated agent, if any, would be unwarranted and, if statutory licensees acting as willing buyers in the statutory license marketplace support multiple designated agents, then they must accept the obligation to deliver their reports of use to each designated agent, whether there are two or two thousand such entities. 10

#### i. Web Site Delivery of Reports of Use

The Copyright Office has asked for comment on whether delivery of reports of use via Internet Web sites should be permitted. April 27<sup>th</sup> NPRM, 70 Fed. Reg. at 21706. SoundExchange does not currently support the delivery of reports of use via an Internet Web site, although SoundExchange does support FTP delivery.

SoundExchange has explored a web-based solution that would allow delivery of reports of use via a secure portal offered and maintained by a third party, but the costs for rolling out such a service – including hosting and management – is not something SoundExchange is prepared to incur at this time. SoundExchange would consider such a delivery mechanism if statutory licensees were required to bear the costs for a fifth delivery mechanism, but absent a shifting in the burden of paying for this additional

Id. at 18 (Sep. 30, 2002).

<sup>&</sup>lt;sup>9</sup> <u>See</u> Comments of SoundExchange at 16-19 (Sep. 30, 2002). By noting the Copyright Office's reference to multiple designated agents, SoundExchange in no way admits to the need for or the efficacy of a multiple designated agent system.

<sup>&</sup>lt;sup>10</sup> SoundExchange has previously stated its belief that statutory licensees and <u>not</u> SoundExchange should bear the burden of providing multiple designated agents with copies of reports of use required under governing regulations:

If SoundExchange is required to make duplicate copies of each report of use, it is also possible that the other Designated Agents may question the integrity of those copies or seek to hold SoundExchange liable for any errors that result from the making of duplicate copies. SoundExchange should not be put in the position of having to certify the accuracy and completeness of any report of use that could just as easily – and more efficiently – be provided by the authoring statutory licensee.

option, SoundExchange believes the regulations should not require report delivery through Internet Web sites.

SoundExchange is already incurring the cost to support four methods for data delivery and has previously noted that each time it incurs a cost to facilitate the data reporting obligations of statutory licensees, it reduces the royalties available for distribution to performers and copyright owners. Performers and copyright owners should not have to incur unlimited costs to solve the problems of those entities enjoying the benefits of the statutory license.

# ii. File Transfer Protocol Delivery of Reports of Use

The Copyright Office has proposed permitting statutory licensees to deliver reports of use using FTP and that SoundExchange be required to "post on a publicly available portion of its Web site instructions for applying for a username and password and access and delivery instructions for FTP." Id. SoundExchange is already accepting FTP delivery of reports of use from numerous statutory licensees, and supports this Copyright Office proposal. SoundExchange will post on its Web site the necessary information for FTP delivery.

Statutory licensees wishing to deliver reports of use using FTP prior to the Copyright Office's adoption of regulations need only send a request to <a href="mailto:reports@soundexchange.com">reports@soundexchange.com</a> requesting an account and further instructions for delivery.

SoundExchange respectfully requests that the Copyright Office adopt a regulation that grants SoundExchange fifteen (15) <u>business</u> days within which to respond to a written request for a username and password, not simply fifteen (15) days.

## iii. Electronic Mail Delivery of Reports of Use

The Copyright Office has proposed allowing statutory licensees to deliver reports of use using electronic mail. <u>Id</u>. SoundExchange supports this proposal provided there is a single report of use per seven-day reporting period less than ten megabytes in size.<sup>11</sup>

The Copyright Office has proposed that in instances where reports of use are delivered as an e-mail attachment, the service must provide its "full address." Id. at 21707. Because the Section 114 statutory license is not limited to transmitting entities located in the United States, SoundExchange respectfully requests that regulations require statutory licensees to provide country name as part of a "full address" for non-U.S.-based services.

The Copyright Office has proposed that SoundExchange be required to acknowledge receipt of e-mail delivery of reports of use "as soon as possible through use of an automated reply e-mail to the delivering party." Id. SoundExchange supports this proposal with the understanding that the acknowledgement of a report of use is not an admission that the delivered report of use is compliant with governing regulations or that the file is not corrupted in any manner. Because a report of use may not be analyzed (through extraction, transformation and loading) by SoundExchange for weeks or months following receipt due to the volume of reporting, the regulations should provide that statutory licensee have an obligation to resubmit a compliant and readable file in the event an acknowledged report is corrupted. Such flexibility should apply to all delivery methods, not simply delivery via e-mail.

<sup>&</sup>lt;sup>11</sup> The Copyright Office's commentary in the Notice of Proposed Rulemaking suggests that services "may" compress an e-mail attachment. SoundExchange respectfully requests that compression of attachments be mandatory.

# iv. CD-ROM and Floppy Diskette Delivery of Reports of Use

The Copyright Office has proposed that statutory licensees be permitted to deliver reports of use using CD-ROMs or Floppy Diskettes. <u>Id.</u> SoundExchange supports this proposal provided that SoundExchange have the right, in its sole discretion, to retain or destroy the physical product on which reports of use are delivered. <u>See</u> Comments of SoundExchange at 9 (Sep. 30, 2002). SoundExchange should not have to incur the additional time and expense of returning product to a statutory licensee when there are product-free delivery methods available to licensees.

SoundExchange also supports the Copyright Office proposal that a service may only deliver a report of use on a CD-ROM or floppy diskette if the entire report of use fits onto a single physical product. As SoundExchange noted previously, "[c]ompiling reports of use for an accounting period from multiple products for one licensee could result in the loss of data and would likely require the allocation of significant time and resources for such an effort." Id.

#### v. <u>File Contents</u>

The Copyright Office has proposed that statutory licensees have the option of submitting reports of use with or without headers at the discretion of the service. April 27<sup>th</sup> NPRM, 70 Fed. Reg. at 21707. SoundExchange prefers the delivery of reports of use with headers but will support files submitted without headers because (1) this is the convention that was adopted for the reports of use provided by the preexisting subscription services and SoundExchange has already developed systems to receive and process reports without headers, and (2) providing non-preexisting subscription services with the option of utilizing products developed for the preexisting subscription services is

a reasonable accommodation to statutory licensees. <u>See</u> Comments of SoundExchange in Docket No. RM 2002-1B at 7-8 (Sep. 30, 2002).

Certain services have objected to the amount of information that must be included in reports of use with headers. See April 27<sup>th</sup> NPRM, 70 Fed. Reg. at 21707. According to the Copyright Office, these services have "advocate[d] a 'flexible' approach to headers that only identifies the fields of data being reported . . . and permits such headers to be embedded in the file as the first line of data or provided in a separate file." <u>Id</u>.

SoundExchange objects to modifying the proposed format of files with headers because such modifications are unnecessary. As the Copyright Office has noted, those services who find including thirteen rows of information at the beginning of each report of use "unduly burdensome may instead choose to submit their data without headers." Id. at 21708.

SoundExchange also objects to the proposal to give statutory licensees the right to provide "multiple files of data and require the agent receiving the data to match up, or overlay, the data from one file to another." <u>Id</u>. at 21707. SoundExchange believes that the Copyright Office has properly identified the problem of allowing licensees to deliver a report of use for a single reporting period in multiple files: "[a]llowing submission of multiple files of data will . . . unduly burden the agent processing the data and likely result in confusion and a high error rate in attempting to overlay the data." Id, at 21708. <sup>12</sup>

<sup>&</sup>lt;sup>12</sup> SoundExchange had at one time proposed regulations that would have required statutory licensees to provide two reports of use per reporting period: a "playlist log" and a "listener log." SoundExchange was prepared to overlay the listener log (a non-user specific log that would identify when someone was receiving a transmission but not the identity of the person or entity receiving the transmission) with a playlist log (a log detailing the identification of each sound recording transmitted). Due to the overwhelming outcry from statutory licensees, however, SoundExchange withdrew this proposal. See Reply Comments of the RIAA at 78-79 (Apr. 26, 2002). It is interesting that certain entities, including those who objected to SoundExchange's original proposal, are now seeking a regulation that would require SoundExchange to overlay a log of transmission data with playlist information.

Statutory licensees have sole possession of the data they transmitted, and SoundExchange should not have to overlay one file on top of another in the hopes of obtaining accurate information on the sound recordings transmitted and the number of times such recordings were transmitted.

SoundExchange agrees with the Copyright Office that the advocates of the multiple-file option have failed to demonstrate "that such a practice can be done efficiently without significant error and expense" to SoundExchange. <u>Id</u>. at 21707. SoundExchange therefore respectfully requests that this option be rejected.

With respect to specific information to be reported in a file with headers, SoundExchange notes the following:

- Address Information the fourth row of a report with headers should include the city, state, zip code and country name of the service submitting the report of use. As the Section 114 statutory license is not limited to entities located in the United States, the exclusion of the country name would provide SoundExchange with an incomplete mailing address for non-U.S.-based licensees.
- Start of reporting period as noted above, SoundExchange recommends that the seventh row of a report with headers contain the beginning date of the seven or fourteen-day period being reported and not simply the first day of the calendar quarter for which the report of use is being provided.
- End of reporting period SoundExchange recommends that the eighth row of a report with headers contain the ending date of the seven or fourteen-day period being reported and not simply the last day of the calendar quarter for which the report of use is being provided.
- Text indicators the eleventh row of a report with headers is for the identification of the text indicator, the one-character symbol that must be unique and never found in a report's data content. In order to avoid any confusion, SoundExchange respectfully requests that any final regulations make clear that text indicators should be used to delineate the beginning and end of a text field, which may include the name of the service, the transmission category, the artist, the song title, the album, etc., even if such names are comprised of numbers only or contain numbers (e.g., 3 Doors Down).

- Field delimiters the twelfth row of a report with headers is for the identification of the field delimiters, the character that delineates the end of a data field. In order to avoid any confusion, SoundExchange requests that any final regulations make clear that if a tab is used as the delimiter, the word "TAB" should be used in the twelfth row.
- SoundExchange respectfully requests that any table included with the publication of an order establishing format and delivery specifications for reports of use be updated to reflect the comments identified above and not include periods at the end of an entry in the "Example" column. SoundExchange is concerned that the inclusion of periods in a summary table may cause certain statutory licensees to similarly include periods at the end of each of the first thirteen rows of data in a report with headers.

With respect to the specific information to be reported in a file without headers, SoundExchange notes the following:

- Carets SoundExchange respectfully requests that the statement "Carets (^) should surround strings" should be clarified to say "Carets (^) should be used as the text indicator, surrounding alphanumeric data elements such as service name, transmission category, channel name, artist, song title, album. Text indicators should be used to delineate the beginning and end of a text field, which may include the name of the service, the transmission category, the artist, the song title, the album, etc., even if such names are comprised of numbers only or contain numbers (e.g., 3 Doors Down)."
- Abbreviations in order to avoid confusion in the reporting of alphanumeric data, SoundExchange respectfully requests that final regulations indicate that the use of an underscore in regulations represents a space unless otherwise indicated, but the underscore should not be in reported data. For example, a space should appear between a first and last name, and the performer Jennifer Lopez should be reported as "JENNIFER LOPEZ" in a report of use even if the draft regulations use the convention "JENNIFER\_LOPEZ" where the "underscore" signifies a space.
  - e. Reporting Actual Total Performances or Aggregate Tuning Hours

In the Interim Regulations, the Copyright Office gave statutory licensees the option of reporting either "[t]he actual total performances of the sound recording during the reporting period or, alternatively, the (A) Aggregate Tuning Hours; (B) Channel or

program name; and (C) Play frequency." Interim Regulations, 69 Fed. Reg. at 11530 (Mar. 11, 2004) (codified at 37 C.F.R. 270.3(c)(2)(vi)). SoundExchange respectfully requests that the regulations clarify that whichever reporting method is selected (e.g., actual total performances or ATH), that option must be used throughout a report of use and, preferably, for an entire year. If statutory licensees are permitted to report Aggregate Tuning Hour information for the transmission of some sound recordings and actual total performances for other sound recordings in the same report of use, SoundExchange's royalty distribution system would not be able to accurately apply and allocate royalties received for those various performances.

#### B. Exhibits

To assist statutory licensees in data reporting, SoundExchange has updated its File and Reports of Use Delivery Specifications document originally submitted as Exhibit A to the Comments of SoundExchange dated September 30, 2002. The updated File and Reports of Use Delivery Specifications document is attached hereto as Exhibit B.

SoundExchange has also created the Excel template requested by the Copyright Office. A printout of that template is attached hereto as Exhibit C.

SoundExchange also suggests minor revisions to the proposed regulations included in the Copyright Office's notice of proposed rulemaking, 37 C.F.R. Part 270. The proposed revisions are noted in Exhibit D. A clean version of SoundExchange's proposed regulations is included as Exhibit E.

<sup>&</sup>lt;sup>13</sup> Certain eligible nonsubscription services and new subscription services were required to make an election covering an entire License Period when they chose among per performance, ATH or percentage of revenue options for calculating statutory liability. See 37 C.F.R. § 262.3(b). The License Periods were 2003-2004 for eligible nonsubscription transmission services and 1998-2004 for new subscription services. See Final Rule in Docket Nos. 2002-1 CARP DTRA3 and 2001-2 CARP DTNSRA, 69 Fed. Reg. 5693 (Feb. 6, 2004).

SoundExchange will gladly make an electronic version of these comments or its Exhibits available upon request.

#### IV. CONCLUSION

SoundExchange appreciates the Copyright Office's efforts to adopt recordkeeping regulations that meet the statutory requirement that licensees provide copyright owners (and performers) with reasonable notice of the use of sound recordings under statutory license. The electronic delivery of reports of use by statutory licensees in a standardized format is essential if copyright owners and performers are to receive a substantial percentage of the royalties paid by licensees undiminished by the costs of royalty collection and distribution. Without standardized and robust reporting requirements, there is simply no economical way to ensure that those performers and copyright owners whose works have been performed will be compensated for those performances.

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SoundExchange looks forward to working with the Copyright Royalty Judges and statutory licensees on the implementation of final regulations consistent with the format and delivery specifications proposed by the Copyright Office.

Respectfully submitted,

SOUNDEXCHANGE, INC.

y:

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Dated: May 27, 2005

# Before the COPYRIGHT OFFICE LIBRARY OF CONGRESS

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In the Matter of:

NOTICE AND RECORDKEEPING FOR USE OF SOUND RECORDINGS UNDER STATUTORY LICENSE

Docket No. RM 2005-2

COMMENTS OF SOUNDEXCHANGE, INC.

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August 26, 2005

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#### COMMENTS OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. ("SoundExchange"), a nonprofit organization incorporated in the State of Delaware and jointly controlled by representatives of sound recording copyright owners and performers through an eighteen-member board of directors, on behalf of itself and the tens of thousands of copyright owners and performers on whose behalf it collects and distributes statutory royalties, respectfully submits these Comments in response to the Copyright Royalty Board's ("Board") Supplemental Request for Comments for Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2005-2, published in the Federal Register on July 27, 2005. 70 Fed. Reg. 43,364 ("Supplemental Request").

#### INTRODUCTION

SoundExchange appreciates the Board's efforts to establish format and delivery specifications for reports of use that satisfy the statutory requirement that copyright owners receive "reasonable notice of the use of their sound recordings" under statutory license.

17 U.S.C. §§ 114(f)(4)(A), 112(e)(4). SoundExchange has worked diligently to develop a royalty collection and distribution system that operates efficiently and effectively, enabling copyright owners and performers to receive timely royalty payments with limited administrative cost while at the same time providing licensees with the tools they need to fulfill their statutory obligations.

To operate efficiently and effectively, SoundExchange relies on automated technology. SoundExchange's custom-built computer system is capable of collecting the large amounts of data reported by the hundreds or thousands of services that are making or will be making digital audio transmissions of sound recordings under statutory license, and then processing that data to calculate the amount of royalties to which each of the tens of thousands of copyright owners and performers is entitled. To process this enormous amount of information with as minimal administrative cost as possible, SoundExchange must receive data in a single standardized format, which is consistent with standard business practices for automated data exchange. The

harm that would be caused by any type of "flexible" formatting requirements cannot be overstated — without significantly reducing the costs for webcasters, such "flexible" formatting would dramatically increase SoundExchange's costs, taking money out of the pockets of the statute's beneficiaries — artists and record companies.

In the comments below, we have attempted to respond to the Board's request for more detailed information regarding the notice and recordkeeping requirements proposed by the Copyright Office in its April 27, 2005 Notice of Proposed Rulemaking ("NPRM") and for reports from consultants. To that end, we submit the Declaration of Shane Sleighter (attached hereto as Ex. A), a vendor with substantial experience in software development. Mr. Sleighter explains in detail why SoundExchange's computer system needs incoming data to conform to fixed format and delivery specifications. Indeed, fixed format and delivery specifications are the norm for organizations that process large quantities of electronically transmitted data, including the U.S. Government. Mr. Sleighter also provides detailed responses to each of the Board's specific factual questions, with the exception of a few to which his areas of expertise do not relate. We have answered the questions outside of Mr. Sleighter's expertise.

We also submit the Declaration of Barry M. Massarsky (attached hereto as Ex. B), the founder and principal of Barry M. Massarsky Consulting, Inc., to address another issue of enormous significance – whether a system of sample reporting is an adequate substitute for the census reporting SoundExchange has proposed and the Copyright Office indicated would be appropriate under the statutory standard. Copyright Office Interim Regulations in Docket No. 2002-1E, 69 Fed. Reg. 11,515, 11,526 (Mar. 11, 2004) ("Once final regulations are implemented, year-round census reporting is likely to be the standard measure rather than the periodic reporting that will now be permitted on an interim basis."). The short answer is that sample reporting is insufficient, is inconsistent with the statute itself, and will seriously harm many artists who will not receive compensation for the use of their works. As Mr. Massarsky's Declaration sets forth in detail, he conducted a study of the impact of sample reporting on the

accuracy with which sound recording performances are reported, and concluded that sampling would result in massive underreporting of the copyright owners and performers whose sound recordings are actually performed. To avoid this harm, which undermines the purpose of the statute, and to accurately identify the copyright owners and performers who are entitled to statutory royalties, census reporting is essential.

#### RESPONSES TO LEGAL AND POLICY QUESTIONS

SoundExchange responds to the Board's legal and policy questions first because our responses to these "questions of a more general nature," Supplemental Request, 70 Fed. Reg. at 43,368, reflect principles that guide and inform our responses to the Board's specific factual questions that are of a more technical nature.

1. Did Congress, in 17 U.S.C. 114(f)(4)(A) and 112(e)(4), require the Copyright Royalty Judges to prescribe particular formatting and delivery requirements at the level of detail described in the April 27, 2005, notice of proposed rulemaking? Is there some relevant set of Internet conventions or practices that could guide the Board in setting data submission standards here?

The statute's text, purpose, and legislative history – as well as the practical reality of the exchange of massive amounts of data in electronic form – compel the conclusion that the CRJs must prescribe formatting and delivery requirements. Sections 112 and 114 of the Copyright Act require those using copyrighted sound recordings under the statutory licenses to compensate copyright owners and requires the Copyright Office to provide "reasonable notices of use." 114(f)(4)(A) and 112(e)(4). The legislative history of the Copyright Royalty and Distribution Reform Act of 2004 explains that the purpose of recordkeeping is "to insure the proper use of the [section 112 and 114] license[s] and to insure proper payment to the proper parties." H.R. Rep. No. 108-408, at 42 (2004), reprinted in 2004 U.S.C.C.A.N. 2332, 2357.

Satisfying these statutory requirements and fulfilling the statute's purposes requires the Board to establish detailed procedures and formats. Proper payment requires SoundExchange to receive reports of millions of performances of copyrighted sound recordings whose performers

and owners are entitled to payment. As the Copyright Office recognized in the April 27, 2005 NPRM, the most efficient method of transmitting reports of use is electronically, 70 Fed. Reg. at 21,706. That fact cannot be seriously disputed given the mass of information SoundExchange is charged with processing in order to collect and distribute royalty payments for digital performance of sound recordings. Moreover, the requirements for reports of use submitted electronically necessarily involve details technical in nature. Although SoundExchange has employed its best efforts to reach agreement with the licensees who have objected to our proposed format and delivery specifications, we have been unable to do so. It is therefore incumbent upon the Board to establish the requirements that will insure that SoundExchange receives from licensees the information it needs "to insure proper payment to the proper parties" as well as the information copyright owners need "to insure proper use of the [statutory licenses]."

In this day and age, any other notice would be unreasonable as well as contrary to the very nature of the digital medium giving rise to the statutory liability, and thus arbitrary and capricious. Indeed, many businesses such as banks, and in some instances the U.S. government, require transmissions of large amounts of data to be made electronically. See, e.g., SunTrust Bank's File Specifications for Consumer Debits and Credits and for Corporate Debits and Credits, (attached hereto as Exs. C and D), and Wachovia's Cash Management - ACH Formats (updated Nov. 2002) (attached hereto as Ex. E); see also 8 C.F.R. § 217.7 (Department of Homeland Security requirement that airlines submit passenger information electronically via electronic mail (e-mail), or floppy diskette); 30 C.F.R. § 210.21 (Department Of the Interior electronic reporting requirements for reports to Minerals Management Service).

<sup>&</sup>lt;sup>2</sup> We have discussed with College Broadcasters, Inc. ("CBI") that organization's proposal of a joint request to extend the deadline for filing supplemental comments with the Board and continue discussing the possibility of settlement, and we understand that National Religious Broadcasters Music License Committee and Salem Communications Corporation may also desire an extension. While SoundExchange agrees that negotiated settlements are always preferred, we have not agreed to seeking an extension here because (i) our experiences to date in attempting to reach agreement on the reporting requirements lead us to believe that a negotiated settlement in an appropriate time frame is unlikely, and (ii) further delay in the adoption of reporting requirements adversely harms the copyright owners and performers we represent. CBI and NRBMLC, as well as other small webcasters, have not shown a willingness to provide reports that accurately reflect the breadth of their programming nor have they agreed even on the need for electronic reporting. Because regulations establishing formatting requirements for reports of use have not been issued, SoundExchange has been unable to distribute the millions of dollars in royalties it has collected since April 2004. While some services have voluntarily submitted reports of use in a format compatible with SoundExchange's system, e.g., Gore-Overgaard Broadcasting, Inc., Live365, and AOLRadio, see Sleighter Decl. ¶ B, others have transmitted royalty payments but not the reports of use SoundExchange needs to be able to allocate the royalty payments among copyright owners and performers. SoundExchange therefore urges the Board to proceed as expeditiously as possible in establishing reporting requirements that will enable SoundExchange to distribute the undistributed royalties it is currently holding as well as the royalties it will collect prospectively.

While SoundExchange appreciates the Board's discomfort with having to establish regulations outside its "reservoir of traditional agency expertise," there is ample evidence from the practices of the U.S. Government, as well as other large organizations, of the need for regulations at the level of detail described in the NPRM. Examples of the U.S. government organizations' detailed format and delivery specifications include specifications for child support enforcement data exchange (attached hereto as Ex. F), and the standards posted on the FedeBiz Web Site for status information on shipments of goods, (attached hereto as Ex. G, downloaded from http://fedebiz.disa.mil/FILE/IC/FED/4030/856S/43f856sa.pdf), for customer account analysis (primarily for banks), (attached hereto as Ex. H, downloaded from http://fedebiz.disa.mil/FEDICGET.html?FED3040), and for weapons systems data changes, (attached hereto as Ex. I, downloaded from http://fedebiz.disa.mil/FILE/IC/FED/4030/888w/43f888wa.pdf). Other organizations' similarly detailed format and delivery specifications include Arizona Department of Health Services' Hospital Discharge Data Reports, (attached hereto as Ex. J), SunTrust Bank's File Specifications for Consumer Debits and Credits and for Corporate Debits and Credits, (attached hereto as Exs. C and D), and Wachovia's Cash Management - ACH Formats (updated Nov. 2002) (attached hereto as Ex. E). The National Institute of Standards and Technology ("NIST") has explained the necessity of detailed standards for Electronic Data Interchange ("EDI") as follows:

Standards Required for EDI. From the point of view of the standards needed, EDI may be defined as an interchange between computers of a sequence of standardized messages taken from a predetermined set of message types. Each message is composed, according to a standardized syntax, of a sequence of standardized data elements. It is the standardization of message formats using a standard syntax, and the standardization of data elements within the messages, that makes possible the assembling, disassembling, and processing of the message by computer.

Implementation of EDI requires the use of a family of interrelated standards. Standards are required for, at minimum: (a) the syntax used to compose the messages and separate the various parts of a message, (b) types and definitions of application data elements, most of variable length, (c) the message types, defined by the identification and sequence of data elements forming each message, and

(d) the definitions and sequence of control data elements in message headers and trailers.

Additional standards may define: (e) a set of short sequences of data elements called data segments, (f) the manner in which more than one message may be included in a single transmission, and (g) the manner of adding protective measures for integrity, confidentiality, and authentication into transmitted messages.

Federal Information Processing Standards 161-2 at 2 of 11 ("FIPS PUB 161-2") (NIST Apr. 29, 1996) (copy downloaded from <a href="http://www.itl.nist.gov/fipspubs/fip161-2.htm">http://www.itl.nist.gov/fipspubs/fip161-2.htm</a> (attached hereto as Ex. K). (emphasis added); accord id. at 1 (describing EDI as "the computer-to-computer interchange of <a href="https://www.itl.nist.gov/fipspubs/fip161-2.htm">https://www.itl.nist.gov/fipspubs/fip161-2.htm</a> (attached hereto as interchange of <a href="https://www.itl.nist.gov/fipspubs/fip161-2.htm">https://www.itl.nist.gov/fipspubs/fip161-2.htm</a> (attached hereto

As the NIST standards explain and the above examples of the government and private business format specifications illustrate, EDI requires a standardized syntax using a sequence of standardized data elements. Such strict formatting is necessary for data to be exchanged electronically. SoundExchange's proposed format specifications, by requiring the use of specific data elements in specific fields, are consistent with the federal government's approach to EDI, as well as that of other organizations.

<sup>&</sup>lt;sup>3</sup> NIST identifies the following primary objectives of EDI:

a. to ease the interchange of data sent electronically by use of common standards that allow for automated message processing;

b. to promote the achievement of the benefits of EDI: reduced paperwork, fewer transcription errors . . .

c. to promote migration to a universally used family of EDI standards, in order to further Government efficiency and to minimize the cost of EDI implementation by preventing duplication of effort.

Federal Information Processing Standards 161-2 at 4 (Ex. K). The principles on which SoundExchange bases its proposed specifications are analogous:

<sup>&</sup>lt;u>First</u>, the adopted format of the reports of use must enable an agent designated to collect and distribute statutory royalties to develop automated, economical data processing systems to facilitate the accurate and efficient distribution of royalties. <u>Second</u> the adopted formats must be based upon commonly accepted standards for the electronic exchange of data between entities to facilitate such exchanges and minimize any costs that may be required for the development of new delivery or processing systems. <u>Third</u>, the files should not be attributed with any operating system settings that do not allow the file to be read using widely used data loading tools. <u>Fourth</u>, the adopted formats must be robust enough to accommodate different file sizes and delivery mechanisms.

Comments of SoundExchange in Docket No. RM 2002-1B at 4 (Sept. 30, 2002).

2. Could a system of webcast sampling, analogous to the sampling performed by performing rights societies in the context of broadcasting, meet the record-of-use requirements of 17 U.S.C. 114(f)(4)(A) and 112(e)(4)?

As indicated by the attached Declaration of Barry M. Massarsky, (Ex. B), a system of sample reporting similar to that prescribed by performing rights societies would deprive tremendous numbers of recording artists and record labels of statutory royalties. A system of sampling would not satisfy the requirement of 17 U.S.C. §§ 114(f)(4)(A) and 112(e)(4) that copyright owners receive "reasonable notice of the use of their sound recordings." By its nature, a system of sampling would report only some and not all of the performances made under the license, resulting in payment of some, but not all, performers and owners. That necessarily conflicts with the statute's mandate that copyright owners and artists be paid for the use of their works under the statutory license. Indeed, the regulations that the Board must implement present a far different situation than voluntary agreements for reporting entered into by the performing rights societies; whereas such organizations may be free to enter into agreements authorizing less than census reporting, Congress did not authorize the Board to impose a system in which some artists and copyright owners are denied compensation, even though their works are being used by others.

In addition, as discussed below and in the Declaration of Barry Massarky, the inequities of a sampling system in the context of webcasting are likely to far exceed any inequities that may occur from the use of sampling with respect to terrestrial radio broadcasts. Webcasters typically utilize extraordinarily broad playlists, much broader than those of terrestrial radio broadcasters. This is especially true with college radio stations. *See, e.g.,* Comments of Harvard Radio Broadcasting in Docket No. RM 2002-1 at 5 (Apr. 5, 2002). Because of the breadth of typical webcaster playlists, a system of sampling would result in significantly inaccurate reporting of the sound recordings that are actually performed by services making digital audio transmissions under the statutory license.

In order to demonstrate the enormous unfairness that would be created by a system of sampling, SoundExchange is providing the Declaration of Barry Massarsky. Mr. Massarsky compared (a) the sound recordings reported in a full census report of use covering January 1 to March 31, 2005, that one service transmitted to SoundExchange, with (b) the sound recordings identified in samples of that report of use. Based on the sample periods the performing rights organization ASCAP would likely rely upon under its experimental Internet licenses, as well as the argument of some webcasters for sample periods of one to three days, Mr. Massarsky pulled the following samples from the three-month "census" period: one week, the first three days of the period, three non-consecutive days, and one day. Mr. Massarsky then directed a SoundExchange employee to perform an automated comparison of (a) the data for each sound recording identified in the full census report of use – viz., the sound recording title, record label (the copyright owner), and artist name – with (b) the data for each sound recording captured in each of the sample periods. The results are displayed in the Excel spreadsheets and graphs attached to Mr. Massarsky's Declaration as Exhibits 1, 2, and 3.

As the spreadsheets and graphs illustrate, the percentage of copyright owners and performers whose sound recordings are omitted increases significantly as the period measured shifts from the full census period to the one-day sample period. For example, the one-day sample omitted nearly 70% of copyright owners whose works were actually performed during the census period. The three-days samples omitted nearly half (45.25% in the three-non-

<sup>&</sup>lt;sup>4</sup> It is SoundExchange's position that there is no legal impediment to identifying the service that provided the report of use. However, out of an abundance of caution, we do not identify the service whose data Mr. Massarsky analyzed in this Declaration. If the Board were to issue an order directing SoundExchange to reveal the service's identity, we will readily do so.

<sup>&</sup>lt;sup>5</sup> See, e.g., Intercollegiate Broadcasting System, Inc. ("IBS") Comments in Docket No. 2002-1 at 4 & n.3 (undated, but stamped as received Apr. 5, 2002); Harvard Radio Comments in Docket No. RM 2002-1H at 3 (May 27, 2005).

<sup>&</sup>lt;sup>6</sup> As explained in Mr. Massarsky's Declaration, the starting dates of each of the sample periods were randomly selected using a computer randomization program.

<sup>&</sup>lt;sup>7</sup> A SoundExchange employee, rather than an employee of Barry M. Massarsky Consulting, Inc., performed the comparison because SoundExchange maintains possession and control of the report of use.

consecutive day sample and 45.88% in the sample of the first three days of the census period) of copyright owners whose works were performed. The one-week sample omitted nearly 30% of the copyright owners whose works were performed, meaning that the sample captured only 70% of the copyright owners whose works were actually performed.

The results for performers were comparable. In the one-day sample, over 70% of the recording artists whose works were performed were missed. In the three-day samples, almost half (47.92% in the three-non-consecutive day sample and 48.16% in the sample of the first three days of the census period) of such recording artists were missed, and the one-week sample missed over 31% of the recording artists whose works were performed during the three-month period. In addition to the more than 70% of performers whose works were performed but would not receive any compensation, the spreadsheets further show that using a sample of one day out of a three-month period would result in another more than 20% of recording artists whose works were actually performed being underpaid.<sup>8</sup> In addition to those performers who would not be paid at all with a sample period of three days, using such a sample would also cause more than a third (36.25% in the three-non-consecutive day sample period and 33.75% in sample of the first three days of the census period) of recording artists to be underpaid, and a one-week sample period would result in almost 40% of recording artists being underpaid. The large numbers of performers and copyright owners who would be paid nothing or would be underpaid under a system of sampling demonstrate that such a system is wholly insufficient to satisfy the statutory requirement for records of use.

SoundExchange also references the results of its 2003 analysis of the impact of sampling prepared in support of its December 22, 2003, Reply Comments before the Copyright Office on notice and recordkeeping. (The results of that analysis, Exhibit A to SoundExchange's

<sup>&</sup>lt;sup>8</sup> The percentage of artists who would be underpaid does not include artists who would be paid nothing at all because they were not captured in the sample.

December 22, 2003, Reply Comments in Docket No. 2002-1D, are attached hereto as attached hereto as Ex. L.) In that analysis, SoundExchange compared (a) full census reports of use provided by the then-existing three preexisting subscription services ("PES") for the period January 1 through March 31, 2002 (the "Study Period") to (b) reports for various three-day and seven-day sample periods pulled from the Study Period. The results of the three-day sample were tremendously harmful to copyright owners and performers; anywhere from thirty to fifty-three percent of the sound recordings reported by the PES on their reports of use for the Study Period were omitted from the sample. Even in the seven-day sample, significant omissions still occurred. According to SoundExchange's analysis, the seven-day sample omitted between twelve and thirty-two percent of the sound recordings reported by the PES on their reports of use.

The Copyright Office recognized in issuing the Interim Regulations for recordkeeping in this proceeding that "before [a designated agent] can make a royalty payment to a copyright owner, [it] must know how many times the eligible digital audio service made use of the [copyright owner's] sound recording and how many listeners received it." 69 Fed. Reg. at 11,516; see also id. at 11,526 (recognizing that census reporting "is likely to be the standard measure" provided in final recordkeeping regulations). The results of Mr. Massarsky's analysis and SoundExchange's 2003 analysis demonstrate that a system of sample reporting is not workable because it would not enable SoundExchange to know "how many times the eligible digital audio service made use of the sound recording[s and for which royalties are owed] and how many listeners received it." Without this information, SoundExchange would lack the means necessary to "insure proper payment to the proper parties," H.R. Rep. No. 108-408, at 42, reprinted in 2004 U.S.C.C.A.N. at 2357; see also 17 U.S.C. § 114(g)(2) (requiring SoundExchange to distribute royalties for sound recording performances among the copyright owners of the sound recording, the featured recording artist or artists, and the non-featured musicians and non-featured vocalists.) Indeed, Mr. Massarsky concluded that "a census of sound

recording digital performance data, rather than sampling analogous to that of ASCAP, is necessary to accurately identify the copyright owners and artists whose sound recordings have been performed and are entitled to royalties under the statutory license." Massarsky Decl. ¶ 35.

If sample periods such as those analyzed by Mr. Massarsky are adopted by the Copyright Royalty Board, then those copyright owners and performers whose works are not captured in a sample period would be paid nothing in a royalty distribution even though their works were in fact performed under the statutory licenses. Because sample reporting would likely deprive thousands of copyright owners and performers of the royalties which they are entitled to receive from the digital audio transmission of their sound recordings, the Board lacks a record basis to adopt sample reporting. To adopt anything other than census reporting would frustrate Congress' intent to ensure that all artists and labels are compensated for the use of their creative works by services making reproductions or transmissions under a statutory license.

3. Under the provisions of any final rule adopted to implement the notice and record of use requirements of 17 U.S.C. 114(f)(4)(A) and 112(e)(4), either copyright owners (in the form of their agent, SoundExchange) or licensees will be burdened with having to change their existing data systems. From a legal and a policy perspective, on whom is it most appropriate to place these burdens? Is the court's discussion in Amusement and Music Operators Association v. Copyright Royalty Tribunal, 676 F.2d 1144, 1154-55 (7th Cir. 1982), cert. denied, 459 U.S. 907 (1982) ("depriv[ing] copyright owners of increased remuneration for the exploitation of their works by showing that some \* \* \* operations will become unprofitable is \* \* \* unsound and unjust") pertinent to this inquiry?

The congressionally stated purpose of this rulemaking proceeding – to establish formatting and specification requirements that will enable SoundExchange to collect records of use with which it can pay copyright owners and performers the royalties they are entitled for performance of their works – should determine the allocation of burdens between SoundExchange and the licensees concerning recordkeeping requirements. See H.R. Rep. No. 108-408, at 42, reprinted in 2004 U.S.C.C.A.N. at 2357; accord 70 Fed. Reg. at 21,708 ("the [Copyright Act] requires [the Board] to adopt record of use regulations that will facilitate the distribution of royalties") (emphasis added). As the Copyright Office recognized, "while a

balancing of both owner and user interests is desirable, [the Board] is ultimately charged with the task of creating a system that will work." 70 Fed. Reg. at 21,708 (emphasis added).

For the system of collection and distribution of royalties to work, SoundExchange must receive electronic data that is formatted such that software can "read" it and use it to allocate royalties among copyright owners and performers. See Decl. of Shane Sleighter. SoundExchange has already expended a tremendous amount of time and money - working with many webcasters and with a goal of making data exchange as efficient as possible – to develop a user friendly system that benefits licensees, copyright owners, and artists by keeping administrative costs down for all concerned. SoundExchange's software system is like that of other organizations that process large amounts of electronically transmitted data. Because SoundExchange is the single entity designated to receive reports of use from the hundreds of thousands of services that are or will be making digital audio transmissions of sound recordings, requiring licensees to conform their data submissions to a single, fixed format is logical as well as consistent with standard business practices. See, e.g., Expanded Federal Parent Locator Service, Child Support Enforcement Network's Interstate Case Reconciliation Data Exchange Specifications (attached hereto as Ex. F); draft standard for Customer Account Analysis posted on the FedeBiz Web Site, (attached hereto as Ex. H, downloaded from http://fedebiz.disa.mil/FEDICGET.html?FED3040); Arizona Department of Health Services' Hospital Discharge Data Reports, (attached hereto as Ex. J); SunTrust Bank's File Specifications for Consumer Debits and Credits and for Corporate Debits and Credits, (attached hereto as Exs. C and D); and Wachovia's Cash Management - ACH Formats (attached hereto as Ex. E). Once licensees have gained experience using the established format and delivery specifications, they will be able to conform their data submissions to those specifications fairly easily, thereby minimizing the overall costs associated with reports of use.

The Copyright Office based its proposed rules for recordkeeping on what it found to be "the essentials" for organization and formatting of reports of use and for delivering them to

SoundExchange. 70 Fed. Reg. at 21,706. The Declaration of Shane Sleighter, Software Development Manager for Acumen Solutions, Inc., as discussed in more detail below, explains that SoundExchange's software system is unable to accommodate additional flexibility without incurring substantial costs. Licensees should bear the burden of adapting to the "essential" format and delivery specifications necessary for an efficient royalty collection and distribution system.

Indeed, SoundExchange has already alleviated services of significant obligations and burdens. The statutory licenses under sections 112 and 114 of the Copyright Act provide services with a monumental benefit – the right to reproduce or transmit any sound recording lawfully released in the United States without the obligation to negotiate directly with copyright owners for those rights. But nowhere in Sections 112 or 114 are services granted the right to pay royalties or deliver reports of use to a single entity rather than each copyright owner directly. Instead, it was the copyright owners and performers who incurred the expense of creating SoundExchange. If the copyright owners and performers had not undertaken this effort, then the services themselves would have had to pay for the creation of one or more entities to handle royalty collection and distribution, or incurred the cost of paying each copyright owner and performer directly. See Determination of Royalty Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,266 (July 8, 2002) ("Webcaster I") ("Read literally, section 114 appears to require that Services pay the statutory royalties to each Copyright Owner. As a practical matter, it would be impractical for a Service to identify, locate and pay each individual Copyright Owner whose works it has performed.").

Specifically with regard to recordkeeping, SoundExchange initially worked with three preexisting subscription services in order to create a reporting tool that would work with those services' scheduling software. And SoundExchange went further to accommodate eligible nonsubscription transmission services and new subscription services by:

- o Making available the option of reporting use of sound recording performances on the commercially available spreadsheet program Microsoft Excel. SoundExchange has developed and posted on its Web Site the template for creating reports of use with Excel, as the April 27 Notice proposed, consistent with the proposed rules. See <a href="http://www.soundexchange.com/licensee/documents/Excel Template.xls">http://www.soundexchange.com/licensee/documents/Excel Template.xls</a>. SoundExchange provides on its Web Site step-by-step instructions on how to use the Excel template, fill it out, what the data elements are, format of data elements, order of the data elements, values for certain data elements, and how to execute the Macro that saves the file to American Standard Code for Information Interchange ("ASCII") text using the preferred delimiter and text separator. See id. SoundExchange worked with Microsoft to write a Macro that converts Excel spreadsheets into an ASCII file that is formatted for SoundExchange's system. SoundExchange is currently working with Corel toward obtaining a similar Macro for conversion of Quattro Pro spreadsheets into an ASCII file formatted for SoundExchange's system. Sleighter Decl. ¶ A-1.
- Agreeing that services may choose from four delivery options for transmitting reports of use to SoundExchange; via File Transfer Protocol (FTP), e-mail attachment, compact disk-read only memory (CD-ROM), or floppy diskette.
- Agreeing to allow services to submit files with or without headers.

With this system in place, the burden should be on licensees to conform to it, not on SoundExchange to modify it to suit the individual preferences of each and every webcaster. The Board should consider the above-described costs that SoundExchange has already incurred when it considers whether any additional costs should be imposed upon copyright owners and performers. The Copyright Office based its proposed rules for recordkeeping on what it found to be "the essentials" for organization and formatting of reports of use and for delivering them to SoundExchange. 70 Fed. Reg. at 21,706. The Declaration of Shane Sleighter, Software Development Manager for Acumen Solutions, Inc., as discussed in more detail below, explains that SoundExchange's software system is unable to accommodate additional flexibility without incurring substantial costs. SoundExchange believes that the licensees must bear the responsibility and cost of providing standardized reports of use in an electronic format that ensures the prompt, efficient and accurate collection, allocation, and distribution of royalties to the copyright owners and performers entitled to those royalties. Copyright owners and

performers, through their common agent, SoundExchange, should not be burdened with any additional costs.<sup>9</sup>

To the extent that some services seeking to enjoy the benefits of the statutory license argue that the specifications proposed in the NPRM are too onerous or that certain services should be exempted from conforming to a single fixed standard because to do so might jeopardize their financial health, the Seventh Circuit's decision in *Amusement and Music Operators Association v. Copyright Royalty Tribunal*, 676 F.2d 1144 (7th Cir. 1982), is instructive. In that case, the appellate court flatly rejected "the proposition that the [Amusement and Music Operators Association] may deprive copyright owners of increased remuneration for the exploitation of their works by showing that some jukebox operations will become unprofitable" at the royalty rate proposed by the Copyright Royalty Tribunal, deeming the proposition to be "unsound and unjust." *Id.* at 1154-55. The court recognized the realities of a market economy: "Marginal constituents populate every industry in a market economy, and some of these constituents may go out of business when costs increase." *Id.* at 1154. The

The law requires only that the [Copyright Royalty Arbitration] Panel set rates that would have been negotiated in the marketplace between a willing buyer and a willing seller. It is silent on what effect these rates should have on particular individual services who wish to operate under the license. Thus, the Panel had no obligation to consider the financial health of any particular service when it proposed the rates. It only needed to assure itself that the benchmarks it adopted were indicative of marketplace rates.

<sup>&</sup>lt;sup>9</sup> If standards are not fixed and impose too significant a burden on SoundExchange, then the copyright owners and performers represented by SoundExchange reserve the right to seek the adoption of terms in future rate proceedings that require licensees to pay statutory royalties directly to each copyright owner and performer whose recording has been performed. Although the section 112 and 114 statutory licenses have relieved services of the burden to negotiate directly with individual copyright owners for a license to reproduce or transmit sound recordings, the statute does not grant services a right to enjoy the convenience and cost savings of paying a single entity that will bear all of the costs of royalty collection and distribution.

<sup>&</sup>lt;sup>10</sup> The Librarian's decisions are entitled to the weight of precedent in this proceeding. See 17 U.S.C. § 803(a)(1) (providing that the Copyright Royalty Judges shall act based on, inter alia, prior determinations and interpretations of the Librarian of Congress).

67 Fed. Reg. 45,240, 45,254 (July 8, 2002). 11

While Amusement and Music Operators Association and the Librarian's ruling in <a href="Webcaster I">Webcaster I</a> concerned determinations of a royalty rate and this proceeding concerns determination of reporting requirements, the underlying principle is directly applicable here. The Seventh Circuit and the Librarian of Congress recognized that licensees benefiting from a statutory license have certain obligations, such as the obligation to pay royalties. Services benefiting from the section 112 and 114 licenses likewise have obligations, and those obligations include submitting reports of use that are sufficient "to insure the proper use of the [section 112 and 114] license[s] and to insure proper payment to the proper parties," H.R. Rep. No. 108-408, at 42, reprinted in 2004 U.S.C.C.A.N. at 2357. Amusement and Music Operators and Webcaster I establish that the impact of a royalty rate on some services' financial health or viability is not a basis for exempting them from the obligations of a statutory license. Likewise, the impact of reporting requirements that are necessary for SoundExchange to make proper royalty distributions on some services' financial health or viability is no ground for exempting them from the requirements.

<sup>&</sup>lt;sup>11</sup>Likewise, the Copyright Office explained in its announcement of interim notice and recordkeeping regulations that there is no basis for exempting noncommercial entities from the statutory reporting obligations on the grounds that the requirements may cause some services to cease webcasting:

It has been asserted by some services throughout this docket that for some services any reporting of information regarding performances will be too great a burden. While this assertion, if true, might result in certain services ceasing operations under the statutory licenses, it is not a valid reason to eliminate reporting altogether. The law states that the Librarian of Congress must adopt regulations under the section 114 license to provide copyright owners of sound recordings with 'reasonable notice' of the use of their sound recordings. No provision is made for not adopting regulations in certain circumstances, or for exempting certain services from any reporting information. . . . [C]ertain services — in particular noncommercial broadcasters — seek a complete exemption from reporting any data. . . . We find no authority in the statute to create such exemptions, nor do we find such exemptions as constituting "reasonable notice" of the performance of sound recordings.

Copyright Office Interim Regulations in Docket No. 2002-1E, 69 Fed. Reg. 11515, 11521 (Mar. 11, 2004) (internal citations and footnotes omitted). We note again SoundExchange has provided services with tools to lessen the burdens associated with preparing and submitting reports of use, as described above. See supra at 13-14

The claims of some services that they lack the capability (technological and/or financial) to submit data in accordance with the NPRM or that submitting such data would be unduly burdensome likewise provide no statutory basis for adopting alternative regulations that would not provide SoundExchange with the information it needs to perform its collection and distribution services in an efficient and timely manner. 12 There is simply no ground in the statute for an exemption from reporting for any class (e.g., noncommercial entities) or type (e.g., eligible nonsubscription transmission services) of service. See 17 U.S.C. § 114(f)(4)(A) ("The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of use shall be kept and made available by entities performing sound recordings) (emphasis added); accord 17 U.S.C. § 112(e)(4); see also H.R. Rep. No. 108-408, at 42, reprinted in 2004 U.S.C.C.A.N. at 2357 (purpose of recordkeeping requirements is "to insure the proper use of the [section 112 and 114] license[s] and to insure proper payment to the proper parties"). Indeed, the Copyright Office has previously determined that services engaged in webcasting or broadcast simulcasting possess a level of sophistication that justifies requiring those services to provide reports of use:

One could argue that reporting the use of sound recordings is not "reasonable" if a service cannot under any circumstances provide information about the sound recordings. Even if the Office were persuaded that some services cannot report any data – which we are not – the argument would be unpersuasive.

<sup>&</sup>lt;sup>12</sup>We observe that Harvard Radio Broadcasting Company ("WHRB") states on the home page of its Web Site that it "has recently switched streaming service to Live365.com." <a href="www.whrb.org">www.whrb.org</a>. Live365 advertises on its Web Site that it offers "full licensing/royalty coverage for SoundExchange, ASCAP, BMI, and SESAC." <a href="http://www.live365.com/pro/index.html">http://www.live365.com/pro/index.html</a>. It also displays a testimonial from WHRB. <a href="http://www.live365.com/pro/educational.html">http://www.live365.com/pro/educational.html</a>. If Live365 is in fact handling WHRB's reporting and royalty-payment obligations, then WHRB has no cause to challenge the notice and recordkeeping requirements proposed by SoundExchange.

We also note that Salem Communications ("Salem"), a Christian and family-themed multi-station radio operator, is a publicly traded company that had \$187.5 million in net broadcasting revenues in 2004 and total revenues of \$196.9 million that year. Salem Communications 2004 Annual Report at 3 (attached hereto as Ex. M). Its "Station Operating Income Margin" as reported in its 2004 Annual Report was 38.2%. *Id.* These figures indicate that Salem has the financial and should have the technological capability to provide reports of use in the format proposed in the NPRM.

Transmitting a sound recording to the public is not something that accidentally or unknowingly happens. It takes a significant amount of decision making and action to select and compile sound recordings, and a significant amount of technical expertise to make the transmissions. It is not unreasonable to require those engaged in such a sophisticated activity to collect and report a limited amount of data regarding others' property which they are using for their benefit. While making and reporting a record of use is undoubtedly an additional cost of transmitting sound recordings to the public, it is not an unreasonable one.

Copyright Office Interim Regulations, 69 Fed. Reg. at 11521 at n.12.

Placing information about sound recordings performed into reports of use should not be much of a burden for webcasters. Each service availing itself of the statutory license and controlling the programming it transmits has a statutory obligation to display the artist name, sound recording title and album title simultaneously with the transmission of the sound recording, and therefore must be in possession of that information if it wishes to enjoy the protections of the statutory license. See 17 U.S.C. § 114(d)(2)(C)(ix); H.R. Rep. No. 105-796, at 84 (1998), reprinted in 1998 U.S.C.C.A.N. 639, 660. And many college radio stations already require the tracking of all transmitted sound recordings, for example:

- The Policy Manual for KSBR, Jazz/FM 88.5 from Saddleback College in South Orange County, California, states that "KSBR webcasts under the provisions of the Digital Millennium Copyright Act, which requires that electronic records be maintained on every song played on the station. The Scott Studio system automatically produces that record during regular format hours. During specialty shows song information must be manually entered into the computer. Information should be entered in close proximity to the actual time that the song played." KSBR Policy Manual at 8 (attached hereto as Ex. N). (downloaded from <a href="http://www.collegebroadcasters.org/manuals/KSBR%20manual.doc">http://www.collegebroadcasters.org/manuals/KSBR%20manual.doc</a>) (Aug. 4, 2005).
- The Operations Manual for WETD 90.7FM, Alfred State College, Alfred, New York, states that "[e]very music selection . . . must [be] entered on a Log sheet." WETD Operations Manual at 3 (attached hereto as Ex. O) (downloaded from <a href="http://web.alfredstate.edu/wetd/operations.htm">http://web.alfredstate.edu/wetd/operations.htm</a>) (Aug. 4, 2005).
- The Training Manual for WSUM-91.7FM, University of Wisconsin, Madison, Wisconsin, states that students "must fill out an on-line log with all of the songs you play. This is not required by the FCC, but it is helpful to WSUM for charting and whatnot. The playlist is accessible on the computer to the right of the board in Studio A via the world wide web (www.wsum.org/playlist\_input.php). . . . All shows (including talk shows) must log songs played. If you play a new release, be sure to check the appropriate box as well as the genre the new release fits best into." WSUM On-Air/Training Manual (Compiled Spring 2004) at

- 14 (attached hereto as Ex. P), (downloaded from http://www.collegebroadcasters.org/docs/WSUMDraftTrainingManual.doc) (Aug. 4, 2005).
- The Manual for WRCT, 88.3 FM, Carnegie Mellon University, Pittsburgh, Pennsylvania, states that "[t]he purpose of tracking playlists is to keep a record of what artists, albums and songs are being broadcast. These logs enable the Music Director to report accurate information to various record companies and maintain the flow of free music into the station. Playlists are entered into the WRCT database on the air studio computer. See the 'Air Studio Air Studio Computer' section for details on entering playlists." WRCT: A Manual, Revision C (July 2004) at 38 (attached hereto as Ex. Q) (downloaded from <a href="http://www.wrct.org/WRCT-TheManual.pdf">http://www.wrct.org/WRCT-TheManual.pdf</a>); see also id. at 40 ("Log in to the database and start a new playlist for your show."). 13

If college radio stations are already tracking each sound recording broadcast for their own internal purposes, then certainly those stations can provide the same detailed information to SoundExchange.

#### RESPONSES TO SPECIFIC FACTUAL QUESTIONS

In order for statutory royalties to be allocated accurately among the tens of thousands of copyright owners and performers entitled to such royalties, services must provide reports of use in a standardized and structured format. This is not simply a request of SoundExchange; it is a practical reality. Without fixed reporting standards, no entity collecting royalties from thousands or even hundreds of services would be able to allocate and distribute royalties in a cost-efficient manner. If royalties cannot be distributed in a cost-efficient manner, then Congress' goal of ensuring compensation to copyright owners and artists for the use of sound recordings will have failed.

The Declaration of Shane Sleighter, Software Development Manager, Acumen Solutions, Inc., provides detailed responses to each of the Board's specific factual questions, with the exception of those outside his areas of expertise and we therefore did not ask him to address. We

<sup>&</sup>lt;sup>13</sup>The foregoing documents were obtained from CBI's Station Document Resource located at http://www.collegebroadcasters.org/doc.shtml.

summarize those responses below, offer additional information relevant to the questions, and respond to the questions Mr. Sleighter does not address.

#### A. Spreadsheets

The Board has asked questions about SoundExchange's proposal to allow services to provide reports of use using two commercially available spreadsheets. Supplemental Request, 70 Fed. Reg. at 43365. As the Board notes and we reference above, SoundExchange has already accommodated services by agreeing to accept reports of use created with Microsoft Excel. SoundExchange has made available on its Web Site a template for Excel that allows services to easily enter their report of use information, <a href="http://www.soundexchange.com/licensee/documents/Excel Template.xls">http://www.soundexchange.com/licensee/documents/Excel Template.xls</a>, and is working to develop a similar template for Quattro Pro.

Contrary to the assertions of CBI and WHRB, reporting use of sound recordings on a Microsoft Excel or Corel Quattro Pro spreadsheet is not objectively expensive or time-consuming for noncommercial webcasters – or anyone else – with basic familiarity with computers. Many of today's computers come pre-loaded with a Microsoft Excel or Corel Quattro Pro spreadsheet program and the programs are thus already available, essentially, for free. Sleighter Decl. ¶ A-1. Even if purchased separately, the programs are not objectively expensive; Excel may be purchased through an educational institution for \$199 and retails for \$399 for a home user, and Quattro Pro retails for \$89. *Id.* The free template available on SoundExchange's Web Site readily converts data entered into an Excel spreadsheet into ASCII and formats it to be compatible with SoundExchange's system. *See id.* ¶ A-2. The template for Quattro Pro should likewise easily convert data into ASCII and format it for the SoundExchange system. *Id.* 

Because the SoundExchange template for Excel automatically converts report of use data into ASCII there should be no practical difficulties associated with the conversion process. *Id.*Preparing Excel spreadsheets is objectively straightforward and easy, especially with the

assistance of the SoundExchange template. See id. The same should be true for Quattro Pro once a template is developed. It therefore is not foreseeable that services would need technical assistance to prepare Excel or Quattro Pro spreadsheets and convert them into ASCII using the SoundExchange-supplied template. See id. ¶ A-3. In the event assistance in preparing an Excel spreadsheet is necessary, the Excel program includes a "Help" function and Microsoft offers technical assistance on its Web Sites and by telephone (free of charge for the first call). Id. Because SoundExchange is neither a developer nor distributor of either of the spreadsheets proposed by the Copyright Office, it should have no obligation to provide support for services' use of the spreadsheets. We note, however, that SoundExchange would likely provide limited assistance to a service that called with a specific question, but do not believe it is appropriate or within the scope of the Board's authority to adopt regulations that require SoundExchange to provide software support for third-party products.

#### B. Commercially Available Software

The Board has asked about the commercial availability of software that "could be used to compile reports of use," the compatibility of any such software with SoundExchange's system, and the cost of any such software. Supplemental Request, 70 Fed. Reg. at 43,365. Mr. Sleighter's Declaration explains his understanding that one scheduling service, <a href="www.gomusicl.com">www.gomusicl.com</a>, is planning to release software that will automatically generate SoundExchange-formatted reports of use for the sound recordings it schedules for performances. Sleighter Decl. ¶B. Moreover, as SoundExchange has previously noted, the market (i.e., software vendors) will likely develop products that facilitate reporting in accordance with Board regulations once those regulations are determined. See Reply Comments of the Recording Industry Association of America, Inc., Docket No. RM 2002-1A, at 43-48 (Apr. 26, 2002). For

<sup>&</sup>lt;sup>14</sup>In addition, there are many reference materials that offer support for using Excel spreadsheets. *E.g.*, Curtis Frye, Microsoft Office Excel 2003 Step by Step (Microsoft Press 2003) (retailed on Amazon.com for \$16.49).

example, the two remaining preexisting subscription services, Muzak and Music Choice, prepare electronic reports of use utilizing software developed by a vendor to be compatible with SoundExchange's system after Copyright Office recordkeeping regulations were adopted for preexisting subscription services. Sleighter Decl. ¶ B. We do not know what those two services pay for use of the software. *Id.* 

Also, a company named Websound developed an application for the creation of electronic reports of use that complied with SoundExchange's proposed specifications. We do not know if this product was ever commercially released or what its cost was, but during its development SoundExchange received reports of use created by the product and certified the application's compatibility with SoundExchange's systems. Based on these experiences, SoundExchange expects that the market would make available to licensees at market-determined prices the products necessary to comply with the reporting requirements adopted by the Board.

Finally, there are already many eligible nonsubscription transmission services, new subscription services and preexisting satellite digital audio radio services currently providing SoundExchange with electronic reports of use. SoundExchange does not know how these services are generating their reports of use but they are doing so in a manner consistent with SoundExchange's proposed specifications. See id.

#### C. Report Delivery

The Board inquires about the possibility of delivering reports of use to SoundExchange via a Web site. Supplemental Request, 70 Fed. Reg. at 43,365. As the Board notes, SoundExchange already supports four methods for the delivery of electronic reports of use: FTP, e-mail attachment, CD-ROM, and floppy diskette. Mr. Sleighter explains in detail that creating a Web site robust enough to accept reports of use from potentially thousands of services and secure enough to withstand viruses and hackers could cost between \$100,000 and \$950,000, depending on the Web site's functions. Sleighter Decl. ¶ C-1. It is important to highlight that any web-based reporting application will require custom-built software. SoundExchange is

simply unaware of any commercially available product that would enable electronic reports of use to be delivered through a Web site. A requirement to host a Web Site whereby services could drop off their logs or a requirement that would permit webcasters to view reports that they have submitted in the past would cause SoundExchange to incur further costs that would deplete royalties otherwise being paid to performers and copyright owners. This expenditure is unnecessary, especially given that Sound Exchange already offers FTP delivery of logs, which is more efficient than web delivery, and no more difficult.

We assume that the services would expect copyright owners and performers to pay these costs to accommodate the statutory reporting obligations of the services. SoundExchange does not believe copyright owners and performers should be required to have these costs deducted from their royalty payments, particularly when SoundExchange is already offering services four different options for delivering reports of use. The statutory license requires services to provide copyright owners with reasonable notice of the use of sound recordings. Copyright owners and performers have no statutory obligation to provide services with a record of the reports of use they deliver.

#### D. File Naming

The Board has asked "[w]hat is the ASCII standard for reporting days, months and years?," "Is one way more cumbersome or expensive than the other?" and "What is required to be technologically capable of assigning file names of the length proposed in the NPRM?" Supplemental Request, 70 Fed. Reg. at 43,366. NRBMLC/Salem's comments cited by the Board are mistaken in suggesting that there is a single ASCII standard for reporting days, months and years. Mr. Sleighter explains that organizations that regularly receive data electronically establish standard formats for dates so that incoming data will be read properly by their computer systems. Sleighter Decl. ¶ D-1.

SoundExchange established the DDMMYYYY format so that its software system will properly interpret dates submitted by services and, for example, not read 12012005 as

January 12, 2005 if the service was referring to December 1, 2005. *Id.* While the DDMMYYYY format is no less cumbersome or expensive than a YYYYMMDD format or a MMDDYYYY format, SoundExchange must receive the data in a single format; otherwise its system will not be able to read it correctly. *Id.* 

The Board has also inquired "[w]hat is required to be technologically capable of assigning file names of the length proposed in the NPRM?" Supplemental Request, 70 Fed. Reg. at 43,366. Mr. Sleighter explains that most Windows and UNIX programs accommodate file names of 50 characters or more. The naming format proposed by the Copyright Office should not exceed 50 characters. See 70 Fed. Reg. at 21,706-07 (proposing that file names consist of "the name of the service submitting the file followed by the start and end date of the reporting period followed by an underscore and the transmission category code," and giving as an example file name, "AcmeMusicCo.10102004-30042004\_H.txt", which contains 35 characters). Consistently formatted file names "will ensure that file names are consistent across all organizations and that each ASCII file, and each record within the file, can be tracked for each service submitting the reports of use." Sleighter Decl. ¶ D-2.

#### E. File Extension

The Board inquires about the necessity of the ".txt" file extension and what difficulties saving files as .txt files would entail. Supplemental Request, 70 Fed. Reg. at 43,366. As Mr. Sleighter explains, the identification of fields with the .txt extension aids SoundExchange in its archival of files.

Digital audio services should experience no difficulty in using .txt file extensions for their reports. The Macro SoundExchange maintains on its template for Microsoft Excel spreadsheets automatically saves file as ASCII delimited text. The Macro prompts user to name the file, and automatically appends the .txt extension at the end of the file name. Sleighter Decl. ¶ E-2.

# F. Delivery Address

The Board has asked whether Royalty Logic, Inc. ("RLI") has standing to request copies of reports of use and what would be the expense and burden that would be associated with providing RLI with copies of reports of use. Supplemental Request, 70 Fed. Reg. at 43,366. Because RLI has not been designated by the Copyright Office to distribute royalty payments as a "Designated Agent," see 17 U.S.C. 114(g)(3) (referring to the possibility of "designated agents" in addition to SoundExchange), 15 it has no basis for claiming entitlement to receipt of reports of use. If a non-designated entity such as RLI could establish entitlement to copies of reports of use simply by requesting them during a rulemaking proceeding such as this, then any organization — a recording artist management company, or a non-U.S. based performing rights organization representing thousands of copyright owners and performers, for example — would be able to demand copies of reports of use based on nothing more than an appearance in a rulemaking proceeding. The logical consequence could be that hundreds, or even thousands, of similarly non-designated entities— one for each copyright owner and performer entitled to statutory royalties — would be entitled to copies of reports of use.

SoundExchange will not speculate on what the burden would be on the universe of section 112 and 114 statutory licensees if they were required to provide reports of use to each entity that represented at least one sound recording copyright owner or performer for the collection and distribution of statutory royalties. However, SoundExchange would not accept an obligation to provide each potential agent for copyright owners or performers with copies of reports of use submitted to SoundExchange; only services have the obligation to provide reports of use. See 17 U.S.C. §§ 114(f)(4)(B), 112(e)(4). Moreover, given the large number of reports of use that SoundExchange will receive upon the adoption of format and delivery regulations, a

<sup>&</sup>lt;sup>15</sup>While RLI initially sought to become a Designated Agent in the most recent arbitration to set rates and terms for webcasting, it withdrew its petition for unexplained reasons. See 69 Fed. Reg. 5693, 5695 (Feb. 6, 2004).

requirement that it deliver copies to RLI and potentially others would be costly and unduly burdensome to the copyright owners and performers represented by SoundExchange.

There is no reason that this burden should fall on the copyright owners and performers rather than the users of the statutory license. SoundExchange therefore submits that RLI and any other agent for copyright owners and performers must receive reports of use directly from statutory services, but only if such entities are named a Designated Agent in a rates and terms arbitration proceeding. <sup>16</sup>

#### G. Files With Headers

The Board has asked for detailed information about files with headers, including how they are organized, what are the software requirements and costs associated with creating them, and whether there can be any flexibility in how information in a header is organized.

Supplemental Request, 70 Fed. Reg. at 43,367. The Declaration of Shane Sleighter offers detailed responses to each of the Board's questions. See Sleighter Decl. ¶ G.

We highlight here that SoundExchange agreed to offer headers as an optional method of submitting reports of use in order to accommodate the requests of certain webcasters. *Id.* ¶ G-1. Services wishing to deliver reports of use without headers may do so, as long as the reports are in a uniform format of pre-determined order. *Id.* The Macro on SoundExchange's Excel template automatically generates files without headers and is available for free to all services. *Id.* If services use headers, they must submit the header information in a specific order. *Id.* ¶¶ G-4 to

The Copyright Office has long maintained that terms for statutory royalties, such as when and to whom they must be paid, are within the jurisdiction of an arbitration proceeding while recordkeeping was subject to the Copyright Office's rulemaking authority. See, e.g., Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings by Preexisting Subscription Services, Final Rule, 68 Fed. Reg., 39,837, 39,840 n.3 (July 3, 2003) ("The fact that more than one entity could serve as Designated Agents does not mean that there necessarily out to be more than one Designated Agent.") (citing 67 Fed. Reg. 45,329, 45,269 (July 8, 2002)); Letters from Copyright Office to Ms. Woods and Mr. Oxenford of 9/23/04 (copies attached hereto as Ex. R). Reports of use should follow payments and, as such, this rulemaking proceeding is not the appropriate forum to determine whether RLI is entitled to royalty payments or reports of use.

G-6. Because SoundExchange's system is based on EDI best practices, it is configured to accept data in a preset order. <sup>17</sup> Id. ¶¶ G-4 to G-6.

#### H. Field Delimiters and Text Indicators

The Board has asked whether there are industry standards for use of field delimiters and text indicators, whether the Board's regulations should specify the ones to be used, and whether there is room for flexibility, including for commas and quotes to be used as field delimiters and text indicators, respectively. Supplemental Request, 70 Fed. Reg. at 43,367. Mr. Sleighter's Declaration explains that among larger businesses, XML is the standard for business-to-business data exchange and can accommodate various field delimiters and text indicators. Sleighter Decl. ¶ H. While smaller businesses commonly use ASCII files delimited with commas, the comma is not a workable delimiter for reports of use of sound recordings because the character appears in the identifying information of some sound recordings. *Id*.

The Copyright Office correctly recognized that with ASCII files, in order to be effective "[t]he field delimiter character must be unique and never found in the report's data content." 70 Fed. Reg. at 21,709. Mr. Sleighter explains, by way of examples, why field delimiter and text indicator characters that may appear in the names of sound recording titles, album titles, and artist names – such as commas and quotes – would be unworkable for ASCII formatted files. See Sleighter Decl. ¶ H. If SoundExchange's system were programmed to recognize commas and quotes as field delimiters and text indicators, it would fail upon attempting to load records with commas and/or quotes in the data content. *Id*.

Recognizing the flexibility that SoundExchange offers where feasible, we observe that services wishing to select their own field delimiters and text separators may do so by delivering

<sup>&</sup>lt;sup>17</sup>Mr. Sleighter explains that reports created with XML (eXtensible Markup Language) could present data in an alternate order that would be compatible with SoundExchange's system, but the cost of creating XML-formatted reports is most likely prohibitively expensive for smaller webcasters. Sleighter Decl. ¶ G-4.

reports with headers that identify the delimiters and text separators, provided the delimiters and text separators are unique and not found in data entries. For those who choose to deliver reports of use without headers, they must use a standard delimiter and text indicator specified in regulations so that SoundExchange's system will be able to receive and interpret those reports of use.

#### I. Data Fields

The Board asked for additional information regarding the proposed requirement that all data be in upper case, including the costs and benefits of such a requirement, whether SoundExchange's system will accept data in lower case and combination lower and upper case, and whether there are pertinent industry standards. Supplemental Request, 70 Fed. Reg. at 43,367. Mr. Sleighter explains that SoundExchange's system compares data from a particular record with information in SoundExchange's inventory of artists, album, performances, and labels as part of its consolidation of all the royalties owed a given copyright owner or performer for a particular performance. Sleighter Decl. ¶ I-1. SoundExchange's system matches data only if text strings match exactly, including in their case. *Id.* Reconfiguring the system to accept lower case and combination case data would degrade its performance substantially and add delay to the royalty allocation and distribution process. *Id.* Requiring SoundExchange to convert the case of data files submitted by services would also inject risk of error and uncertainty into they process. *See id.* ¶ I-2. Converting text to uppercase should be the burden of each individual service, as that service would only need to convert its data once, whereas SoundExchange would have to convert hundreds of files per reporting period.

While there are no industry standards for data fields, businesses typically agree to standards to reduce errors in data communications. *Id.* SoundExchange proposed all uppercase text so that it will receive uniformly formatted records of sound recording performances that its computer database can match with other records of performances of the same sound recording. *Id.* ¶ I-1. Many large organizations likewise require uppercase text in electronically transmitted

files. E.g., Arizona Department of Health Services Hospital Discharge Data Reports at 1 of 13 (attached hereto as Ex. J); Wachovia Cash Management - ACH Formats at 5 (attached hereto as Ex. E).

#### J. Abbreviations

The Board has asked for information on whether abbreviations should be permitted in data fields of reports of use, and also about the possible utilization of a SoundExchange database of sound recording information in connection with reports of use. Supplemental Request, 70 Fed. Reg. at 43,367. Mr. Sleighter explains that SoundExchange's need for information in a uniform format precludes the use of abbreviations. Sleighter Decl. ¶ J-1. Again, SoundExchange's system will match records for identical sound recordings only if the records identify the sound recordings in exactly the same format. Developing a set of standard abbreviations would likely be cumbersome given the enormous number of sound recordings lawfully released in the United States in the addition to the large number of artists and copyright owners whose names might also be subject to abbreviation. And implementing such a system would be prone to error. See id. ¶ J-2.

Regarding a SoundExchange database of sound recording information, SoundExchange has created such a database from reports of use it receives from services which anyone can query free of charge. There are also commercial tools available for sound recording data. See id. ¶ J-3.

However, the availability of such a database should not make a difference in a service's reporting. The service necessarily possesses the required information for each sound recording it transmits. After all, it is the service that chooses the sound recording, and absent reports or use, SoundExchange would have no way of knowing which of the hundreds of the thousands of sound recordings in its database a given service performed. And as referenced above, services must display the artist name, sound recording title and album title simultaneously with the transmission of a sound recording, and therefore must be in possession of that information. See

17 U.S.C. § 114(d)(2)(C)(ix); H.R. Rep. No. 105-796, at 84 (1998), reprinted in 1998 U.S.C.C.A.N. 639, 660.

#### K. Files Without Headers

The Board has asked for information about files without headers, including whether there are relevant industry standards, what are the costs and benefits of headers, and whether the requirements for files without headers can be flexible. Supplemental Request, 70 Fed. Reg. at 43,367-68. The Copyright Office proposed the requirements for files without headers based on the success with which a similar regulation for preexisting subscription services' reports of use has operated. 70 Fed. Reg. at 21,709. It is appropriate to expect that the application of those requirements to the services implicated in this proceeding will meet with similar success.

Mr. Sleighter explains that the answers to the Board's questions about files without headers are similar to the answers to the Board's questions about files with headers. Sleighter Decl. ¶ K-1. Again, SoundExchange's system will work only if it receives information in a standard format. Id. ¶ K-2. SoundExchange's software systems were not built to accept multiple reports of use containing different data elements from a single service for a single reporting period, with the obligation to "overlay" the multiple reports into a single file. But even if SoundExchange could develop software that could combine multiple files, it should not be required to do so. Services bear the responsibility of providing copyright owners with notice of use of sound recordings, see 17 U.S.C. §§ 114(f)(4)(B), 112(e)(4), and taken separately, an individual file that does not contain complete information for a reporting period would not satisfy the statutory notice requirement. Such a process would also introduce risk of error and uncertainty into the royalty allocation and distribution process. For example, what if a service neglects to send all of its files for a reporting period? How could SoundExchange be sure that it has a complete submission? As the Copyright Office recognized, "[a]llowing submission of multiple files of data will . . . unduly burden the agent processing the data and likely result in confusion and a high error rate in attempting to overlay the data." 70 Fed. Reg. at 21,708.

Requiring SoundExchange to manipulate files in order to combine them could also expose SoundExchange to charges of file tampering. Such risk and uncertainty could be avoided entirely if each service compiled its own report of use into a single file prior to delivery to SoundExchange.

Regarding files in a "native form," SoundExchange's system cannot recognize such files if they do not conform to the format the system is configured to read, as discussed above. Sleighter Decl. ¶ K-4.

\* \* \* \*

SoundExchange looks forward to working with the Board and statutory licensees on the implementation of final regulations consistent with the format and delivery specifications we have proposed.

Respectfully submitted,

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Dated: August 26, 2005

#### Before the COPYRIGHT OFFICE LIBRARY OF CONGRESS

Washington, D.C.

	)	
In the Matter of:	)	
	)	
NOTICE AND RECORDKEEPING FOR	)	<b>Docket No. RM 2005-2</b>
USE OF SOUND RECORDINGS UNDER	)	
STATUTORY LICENSE	)	
	)	

# REPLY COMMENTS OF SOUNDEXCHANGE, INC.

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September 16, 2005

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# Before the COPYRIGHT OFFICE LIBRARY OF CONGRESS

Washington, D.C.

In the Matter of:	)	
NOTICE AND RECORDKEEPING FOR USE OF SOUND RECORDINGS UNDER STATUTORY LICENSE	) ) )	Docket No. RM 2005-2

#### REPLY COMMENTS OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. ("SoundExchange"), on behalf of the thousands of copyright owners and performers on whose behalf it collects and distributes statutory royalties, respectfully submits these reply comments in response to the Copyright Office's Supplemental Request for Comments for Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2005-2, published in the Federal Register on July 27, 2005. 70 Fed. Reg. 43364 ("Supplemental Request").

#### I. INTRODUCTION

After participating in the rulemaking to establish notice and recordkeeping requirements for services availing themselves of the Section 112 and Section 114 statutory licenses for nearly four years, SoundExchange agrees with the Copyright Royalty Board's ("CRB") characterization of this rulemaking as "frustrating." Millions of dollars sit idle, unable to be distributed to labels and artists – the vast majority of whom are small businesses for whom every dollar counts – because the notice and recordkeeping requirements are not in place. The participants to this rulemaking have demonstrated they cannot agree on such requirements, and it is left to the CRB

to impose them. That is the only way to ensure that those entitled to royalties under the statute receive their just compensation.

At least two things are lost in all of the rhetoric from the licensees. First is the simple fact that webcasting and broadcast simulcasting, by their very nature, require some degree of technological sophistication. The licensees are, after all, running websites to allow listeners to access their stations, and using computers to digitally transmit the copyrighted works. When licensees transmit sound recordings to their listeners, the statute requires them to provide "the title of the sound recording, the title of the phonorecord embodying such sound recording, . . . and the featured recording artist, in a manner to permit it to be displayed to the transmission recipient." If services can digitally transmit sound recordings with identifying information, then they should be able to transmit digitally to the agent for copyright owners and performers data identifying the sound recordings transmitted. The licensees' arguments to the contrary are both unpersuasive and unsupported by evidence.

Second, the entire goal of this statutory scheme is to ensure fair and efficient compensation of artists and copyright owners for the use of their works. The statute allows licensees to use the labor of artists and copyright owners, but only on certain conditions, one of which is to provide reports of use.<sup>3</sup> The licensees have all of the information in their possession that is required to ensure that the artists and copyright owners whose sound recordings the licensees transmit are fairly compensated. The licensees know precisely what sound recordings

<sup>&</sup>lt;sup>1</sup> See Interim Regulations in Docket No. RM 2002-1E, 69 Fed. Reg. 11515, 11521 n.12 (Mar. 11, 2004) ("Transmitting a sound recording to the public is not something that accidentally or unknowingly happens. It takes a significant amount of decision making and action to select and compile sound recordings, and a significant amount of technical expertise to make the transmissions. It is not unreasonable to require those engaged in such a sophisticated activity to collect and report a limited amount of data regarding others' property which they are using for their benefit.").

<sup>&</sup>lt;sup>2</sup> 17 U.S.C. § 114(d)(2)(C)(ix).

<sup>&</sup>lt;sup>3</sup> 17 U.S.C. § 114(f)(4)(A).

they play and when. Rather than provide that information, which would allow compensation of all those whose labor has been exploited, licensees ask the CRB to bless a system that (1) would ensure that vast numbers of artists and labels whose works are used will not be compensated at all<sup>4</sup> and (2) would impose enormous burdens (both financial and managerial) on SoundExchange to monitor the licensees' activities or, at a minimum, to constantly have to modify SoundExchange's internal systems to deal with whatever format licensees wish to use.

In both respects, the licensees make arguments that are inconsistent with the statute and simply untenable. Nothing in the statute authorizes the CRB to adopt a system that will result in enormous numbers of artists and labels not receiving any compensation, as the evidence submitted by SoundExchange shows would happen if sample reporting were permitted. Census reporting is absolutely essential, and the licensees provide no evidence (just conjecture) to suggest that it is infeasible. Moreover, no system of royalty collection and distribution – indeed no system of large scale data exchange of any kind – can be based on what the licensees have claimed in this proceeding. In their view, SoundExchange should either monitor the licensees' activities (something that is impossible for SoundExchange but easy for licensees) or conform its systems to whatever types of reporting the thousands of licensees want to make, no matter the cost and complexity that adds to the system.

The premise of most of the licensees' comments, especially the Radio Broadcasters, is that it is somehow unfair to require licensees to do what individuals and businesses do every day in thousands of different contexts – report simple information in a strictly formatted manner.<sup>5</sup>

<sup>&</sup>lt;sup>4</sup> <u>See</u> Comments of SoundExchange in Docket No. RM 2005-2, Exhibit B, Declaration of Barry M. Massarsky (Aug. 26, 2005). Unless noted otherwise, all comments cited in these Reply Comments are to those filed in Docket No. RM 2005-2, which were due by August 26, 2005.

<sup>&</sup>lt;sup>5</sup> Exhibit A attached hereto contains additional explanatory material on Electronic Data Interchange ("<u>EDI</u>"), including how EDI relies upon structured information for the computer-to-computer exchange of information. From

They argue that it is somehow unfair and burdensome to have to use carats ("^") instead of quotes surrounding data elements, or to include the name, address, and other basic information about the station with the sound recording information that they are reporting.

That is absurd. A taxpayer cannot create his or her own tax return for the Internal Revenue Service; the standard forms applicable to all taxpayers must be completed. The licensees' comments (some of which are the exact opposite of the comments they submitted when this rulemaking began) demonstrate that they are not seeking to provide comments in a good faith attempt to assist the CRB in specifying reporting formats, but rather are objecting for the sake of objecting.

In proposing detailed format and delivery specifications, SoundExchange expended considerable time and effort, including creating multiple options for the delivery of reports of use, both in method (i.e., FTP, CD-ROM, floppy diskette and e-mail) and format (i.e., with or without headers). Establishment of clear, simple, and strict formatting requirements is essential for there to be any possibility of collecting, allocating, and distributing royalties in a cost-effective manner. Implementation of a non-system, such as that proposed by the licensees, will result in money going to computer contractors, not to the artists and copyright owners — a result directly contrary to the statute.

In addition to the broad failings of the licensees' comments identified above, what is most disappointing is their refusal to respond at all to the CRB's primary request. In the Supplemental Request, the CRB asked parties to provide evidence – not simply lawyer argument – about the key issues. In repeated filings with the Copyright Office and now the CRB, SoundExchange has provided substantial evidence to support all of its arguments, including,

Wikipedia, the free encyclopedia, located at <a href="http://en.wikipedia.org/wiki/Electronic\_data\_interchange">http://en.wikipedia.org/wiki/Electronic\_data\_interchange</a> (visited Sep. 16, 2005).

among others, publications from U.S. government agencies, state agencies and private corporations explaining the need for or examples of specific data format and delivery specifications; <sup>6</sup> a declaration from a technology professional answering the CRB's specific questions about format and delivery specifications; <sup>7</sup> two surveys proving that sample rather than census reporting by Section 114 statutory licensees is not reasonable; <sup>8</sup> operating manuals from four college radio stations specifying a requirement to record information on every sound recording transmitted; <sup>9</sup> declarations of record label executives confirming the inclusion of identifying information on commercially released and promotional product; <sup>10</sup> and information on the need for comprehensive identifying information per sound recording in order to ensure the accurate distribution of royalties. <sup>11</sup>

In marked contrast, the record is devoid of any evidence submitted by statutory licensees. In response to the CRB's request for reliable, independent evidence, the licensees once again provide only argument and unsupported assertions. The licensees submit no evidence to suggest that sample reporting would be statistically valid (it would not) and cannot explain why some artists and copyright owners should be denied payment because the licensee takes the time to obtain the artist's CD, rip it to a computer, place it on a play list, and play it (activities undertaken to generate revenues or contributions for the licensee), but cannot take the minimal time needed to record that it has used the artist's sound recording. The licensee's only answer—

<sup>&</sup>lt;sup>6</sup> See Comments of SoundExchange, Inc., Exhibits C-K.

<sup>&</sup>lt;sup>7</sup> See id., Exhibit A.

<sup>&</sup>lt;sup>8</sup> See id. Exhibit B; Reply Comments of SoundExchange, Inc., in Docket No. RM 2002-1D, Exhibit A (Dec 22, 2003).

<sup>&</sup>lt;sup>9</sup> See Comments of SoundExchange, Inc., Exhibits N-Q.

<sup>&</sup>lt;sup>10</sup> See Comments of the Recording Industry Association of America, Inc., ("RIAA") in Docket No. RM 2002-1A, Exhibits F-H (Apr. 5, 2002); Reply Comments of RIAA in Docket No. RM 2002-1A, Vol. 2 of 4, Ex. B, Tabs I-12, and Exhibits C-G (Apr. 26, 2002).

<sup>&</sup>lt;sup>11</sup> See Comments of RIAA in Docket No. RM 2002-1A, Exhibit J (Apr. 5, 2002); Reply Comments of RIAA in Docket No. RM 2002-1A, Exhibits P-V (April 26, 2002).

"if it is good enough for ASCAP and BMI, it is good enough for SoundExchange" – is no answer at all. There is no statutory obligation compelling reporting to ASCAP and BMI of the use of musical works as there is for sound recordings under Section 114(f)(4)(A). Moreover, there has been no evidence submitted in this rulemaking explaining the sampling methodologies applied by ASCAP and BMI and whether those methodologies would provide statistically reliable evidence for webcasting.

The licensees' responses to the CRB's questions about the need for strict formatting of data are similarly devoid of support. SoundExchange is the only party that has ever submitted proposed specifications for how data should be reported, and SoundExchange has provided a declaration and numerous government and private sector documents that demonstrate that the efficient functioning of any major data collection system requires strict formatting.

The responses of the licensees range from the non-existent, to the deceptive, to the comical. The Radio Broadcasters, including the largest players in the industry such as Bonneville International Corporation, Clear Channel Communications, Inc., Cox Radio, Inc., Entercom Communications Corp., Salem Communications Corp., and Susquehanna Radio Corp., provide no evidence at all – only the names of three music scheduling software and digital automation systems – RCS Selector, MusicMaster, and PowerGold. They provide no evidence, other than the assertion of counsel, to suggest that these programs are incapable of providing the information requested by SoundExchange. Whatever the capabilities of these programs, to the extent that they do not today include the ability to provide automated reports in the format that SoundExchange requires, it is only because this proceeding has not been completed. Once the CRB establishes notice and recordkeeping requirements, it is a virtual certainty that such

<sup>&</sup>lt;sup>12</sup> Comments of Radio Broadcasters at 17.

programs will provide stock report forms, just as they do for ASCAP and BMI.<sup>13</sup> DiMA failed to disclose that some of its biggest members - such as AOL Radio, Live 365, and MTV Networks – already provide reports of use in SoundExchange's proposed format. And the Radio Broadcasters' assertion that "many smaller radio stations, particularly noncommercial stations" still use DOS (disk operating system)<sup>14</sup> – is unsupported by evidence. Even if it were true, it makes no sense to have SoundExchange design systems to support a wholly outmoded computer system (Microsoft's last version of DOS (v.6.22) was released in 1994), which even the music scheduling software companies are abandoning. 15

Lacking evidence, the Radio Broadcasters and noncommercial entities fall back on their claim that Congress did not intend to impose new burdens on them. Nothing in the statute supports that argument, and it has repeatedly been rejected. The Radio Broadcasters have argued repeatedly - in their lawsuit in the Eastern District of Pennsylvania seeking to overturn the Register of Copyright's determination that broadcast simulcasters were subject to liability for the digital audio transmission of sound recordings, 16 in the Third Circuit appeal of that case, 17 and in

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<sup>13</sup> SoundExchange notes that RCS Selector, to the best of its knowledge, is the software application used by the preexisting subscription services to provide the reports of use required under 37 C.F.R. § 270.2. Comments of Radio Broadcasters at 22 (emphasis added).

<sup>15</sup> See http://www.mmwin.com/ad07.html (scrolling advertisement for MusicMaster which proclaims "DOS stinks") (visited Sep. 16, 2005).

<sup>&</sup>lt;sup>16</sup> The broadcaster plaintiffs in that matter plead that:

The [Register's determination] is flatly inconsistent with Section 114(d)(1)(A), by which Congress exempted from copyright liability FCC-licensed radio broadcasters' transmission of radio station broadcasts on a nonsubscription basis over the Internet. The Rule cannot be reconciled with Congress's legislative scheme to exempt from liability nonsubscription broadcast transmissions posing no threat to the sale of sound recordings and its intent to leave unaltered the mutually beneficial relationship between the radio and record industries.

Bonneville Int'l Corp. v. Peters, Complaint at ¶ 34 (filed in E.D. Pa) (Jan. 25, 2001). <sup>17</sup> Before the Third Circuit, the Radio Broadcasters argued that:

The DPRA thus made it abundantly clear that nonsubscription digital audio transmissions - including expressly 'nonsubscription broadcast transmissions' - were not subject to the limited public performance right in sound recordings created by this legislation. It is thus irrefutable that Congress did not intend to subject digital audio transmissions of radio broadcast programming - whether over the air or via the Internet or otherwise . . . - to new copyright liability. The Senate Report thus confirmed that "it is the Committee's intent to provide copyright holders of sound recordings with the ability to control the

this proceeding 18 – that Congress did not intend for them to have to change their business practices if they chose to take advantage of the new license for webcasting. At each level, those arguments were rejected. The Third Circuit noted that:

the exemptions the DPRA afforded to radio broadcasters were specifically intended to protect only traditional radio broadcasting, and did not contemplate protecting AM/FM webcasting. The DMCA's silence on AM/FM webcasting gives us no affirmative grounds to believe that Congress intended to expand the protections contemplated by the DPRA. The appellants must show something more than congressional silence to argue convincingly that Congress intended to lump AM/FM webcasting with over-the-air broadcasting in § 114(d)(1)(A)'s exemption.<sup>19</sup>

The CRB should again reject the argument – unsupported by the statute or legislative history – that Congress never intended Radio Broadcasters to have to change their business practices.

Section 114 statutory licensees, including broadcast simulcasters and noncommercial entities, are obligated to provide copyright owners with reasonable notice of the use of sound recordings.

There is absolutely no statutory basis for shifting that burden to require copyright owners and performers to monitor the transmissions of Section 114 licensees. Transmitting entities availing

distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings."

Bonneville Int. Corp. v. Peters, Brief of Appellants at 42 (July 15, 2002) (internal citations omitted) (emphasis in original).

<sup>18</sup> In this rulemaking, the Radio Broadcasters have argued that:

Congress made clear that, in establishing the sound recording performance statutory license, it attempted "to strike a balance among all of the interests affected thereby.... As both the Senate and House Judiciary Committees made clear in their reports accompanying the 1995 Digital Performance Rights in Sound Recordings Act ("DPRA"), the intent of that legislation was:

to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.

Congress also emphasized that it wanted to do nothing to upset "the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades."

Id. at 4-5 (emphasis in original) (internal citations omitted).

<sup>&</sup>lt;sup>19</sup> Bonneville Int'l Corp. v. Peters, 347 F.3<sup>rd</sup> 485, 499 (3<sup>rd</sup> Cir. 2003) (emphasis added).

themselves of the benefits of the statutory license must be the ones to provide the information on the uses of sound recordings.<sup>20</sup>

Indeed, the Radio Broadcasters' suggestion that, contrary to any reasonable reading of Section 114(f)(4)(A), SoundExchange should itself monitor webcasts to facilitate distributions in lieu of the licensees providing reports of use is completely absurd.<sup>21</sup> The Radio Broadcasters compare SoundExchange to a telephone company that can monitor telephone calls and bill its customers.<sup>22</sup> Unlike a telephone company, SoundExchange does not control the facilities over which the transmissions occur, does not have a separate relationship with listeners to permit them to monitor use, and could not – technologically or economically – take on the burden of monitoring the activities of thousands of webcasters – all of whom already have the relevant information in their possession and are under a statutory obligation to provide it.

The noncommercial entities now make a similar argument, <sup>23</sup> claiming that because they were temporarily granted a reprieve from paying market rates for their transmissions,

To the extent the Radio Broadcasters are aware of third-parties that monitor their transmissions, such as BDS (see Radio Broadcaster Comments at 7), and have the capability to provide information consistent with the proposed regulations, SoundExchange would likely not object to receiving recordkeeping data from a third party on behalf of an individual broadcaster, provided that the report submitted by the third party complied with the proposed regulations and also included the information on play frequency that is necessary for the allocation of royalties. See Interim Regulations, 69 Fed. Reg. at 11524 ("For those services that lack the technological ability to report the actual number of performances, or choose not to report such information, the Aggregate Tuning Hours, Channel or Program Name, and Play Frequency information must be reported for each sound recording."); id. at 11525 ("Under no circumstances may a service fail to report any data in the performance data field when submitting a record of use of a sound recording); id. ("Aggregate Tuning Hours and Channel or Program Name are not sufficient, by themselves, to permit an equitable distribution of royalties.... Consequently, it is necessary for services that elect not to report Actual Total Performances to report the number of times each sound recording is played during the two week reporting period.").

<sup>&</sup>lt;sup>21</sup> See Comments of Radio Broadcasters at 6.

 $<sup>\</sup>frac{32}{\text{Id}}$  at 9-10.

Unfortunately, licensees have not provided the CRB with an accurate picture of the broadcasting practices of noncommercial entities. Whereas each of IBS and WHRB have portrayed noncommercial entities as incapable of providing comprehensive reports of use in electronic form, SoundExchange submitted evidence indicating that several college radio stations do in fact track each sound recording transmitted, frequently doing so electronically. See Comments of SoundExchange at 19-20 & Exhibits N-Q. WHRB is also now making its transmissions through Live 365, which is capable of providing the reports of use requested by SoundExchange. Id. at 18, n.12.

comprehensive and electronic reporting cannot be justified under a cost-benefit analysis.<sup>24</sup> These arguments are without merit. First, the Copyright Office has previously rejected the arguments that noncommercial entities are entitled to an exemption from reporting.<sup>25</sup> Second, it is improper for the noncommercial entities to attempt to rely upon the non-precedential rates and terms that were adopted pursuant to the Small Webcaster Settlement Act of 2002 ("SWSA") in this rulemaking. SWSA expressly states that:

Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving . . . the establishment of notice or recordkeeping requirements by the Librarian of Congress under paragraph (4) or section 112(e)(4).<sup>26</sup>

Third, there is no basis for the CRB to conclude that the below-market rates established for noncommercial entities pursuant to SWSA will be adopted as the rates for the 2006-2010 rate period. Thus, any reliance on those de minimis fees would be misplaced. Congress has amended Section 114 of the Copyright Act twice since December 2002 and on each occasion Congress has not made special accommodations for noncommercial entities, whether on rates or notice and recordkeeping. Therefore, the CRB cannot conclude that Congress intended for noncommercial entities to avoid the reporting obligation that exists for all Section 114 statutory licensees.

Finally, although SoundExchange may at one time have considered supporting the creation of a working group among copyright owners, performers, and licensees to hammer out format and delivery specifications for submission to the Copyright Office, SoundExchange unfortunately has come to believe that such an effort now would be unproductive.

 <sup>24</sup> See Comments of Intercollegiate Broadcasters, Inc. ("IBS") at 2.
 25 Interim Regulations, 69 Fed. Reg. at 11521 & n.12.

<sup>&</sup>lt;sup>26</sup> Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780, 2782 (Dec. 4, 2002) (emphasis

SoundExchange's view is the result of the licensees' failure to submit good faith proposals that would satisfy their statutory obligation to provide reasonable notice and their increasingly ridiculous arguments (such as their demand that SoundExchange monitor webcasting or broadcast simulcasting transmissions). Moreover, SoundExchange believes there is no statutory basis for the CRB to create a "collaborative-based, standard-setting forum under the auspices of the Library of Congress."<sup>27</sup>

SoundExchange recognizes that the CRB has been frustrated by the parties' inability to reach agreement, but that does not alter the CRB's obligation under the statute. The CRB must weigh the evidence that has been presented in this rulemaking and adopt regulations consistent with that evidence. Because the licensees have failed to introduce evidence as opposed to argument of counsel, the specifications proposed by SoundExchange should be adopted. The licensees should not be permitted to again defer their obligation to provide reports of use by claiming that they will now work in a collaborative manner through a working group. They had their chance to make constructive contributions to the deliberative process and have failed to do so. They have been avoiding their reporting obligations for years and their actions are harming copyright owners and performers. SoundExchange cannot presently allocate the nearly fourteen million in royalties that have been collected for the period April 1, 2004 through May 30, 2005 from eligible nonsubscription transmission services, new subscription services, or services making exempt transmissions to business establishments due to the lack of data needed to allocate such royalties. No further delay is warranted, and the CRB should adopt reporting regulations without further delay so that the copyright owners and performers can receive the royalties to which they are entitled.

<sup>&</sup>lt;sup>27</sup> Supplemental Comments of Harvard Radio Broadcasting Company (hereinafter "WHRB") at 30.

In the remainder of these Reply Comments, SoundExchange will only address a handful of the issues raised by opposing parties. As many of the arguments made by licensees lack supporting evidence or are recycled from previous filings, SoundExchange relies upon its previous filings in this rulemaking for rebuttal.

## II. LEGAL AND POLICY QUESTIONS

## A. Detailed Reporting Regulations Are Essential

The Radio Broadcasters have complained that the proposed format and delivery specifications are too detailed and "go far beyond what Congress could possibly have considered to constitute 'reasonable' requirements." IBS has said that it "does not believe that Congress has required the CRJs 'to prescribe particular formatting and delivery requirements' as detailed in the NPRM." But Congress established a scheme whereby copyright owners and artists would receive royalties for the public performance of their sound recordings via digital audio transmissions. In order for copyright owners and artists to be paid on a per sound recording basis, it is essential to know the sound recordings transmitted under the statutory license. The party best suited to provide that information is the transmitting entity. This is why Congress included language that requires for "records of . . . use . . . [to] be kept and made available by entities performing sound recordings." There can be no question that Congress intended for licensees to provide copyright owners with data on the sound recordings transmitted. Similarly, there can be no question that the CRB has the authority and the mandate to specify the precise content and format of such reports.

<sup>&</sup>lt;sup>28</sup> Comments of Radio Broadcasters at 3.

<sup>&</sup>lt;sup>29</sup> Comments of IBS at 5.

<sup>&</sup>lt;sup>30</sup> 17 U.S.C. § 114(g)(2)(D).

<sup>&</sup>lt;sup>31</sup> 17 U.S.C. § 114(t)(4)(A) (emphasis added).

Because unlimited numbers of services could rely upon the Section 114 statutory license, detailed and highly technical format and delivery specifications must be adopted. While some commenting parties have suggested that SoundExchange should bear the burden of developing a system that would be flexible enough to accept reports of use from thousands of licensees using untold numbers of different software programs, 32 it defies logic that such a system could work. First, the materials on EDI submitted by SoundExchange in its initial comments and as Exhibit A to these Reply Comments indicate that electronic reporting requires specificity. Second, by failing to introduce declarations from expert consultants that such a system would be workable, the licensees' have failed to provide even an iota of evidence to support their arguments, which therefore should be flatly rejected.

As noted above, SoundExchange has submitted two studies that rebut the suggestion that sample reporting is reasonable. By failing to analyze their own records of use and compare sample periods to census data (which they necessarily possess), the statutory licensees have forfeited their right to claim that sample reporting is reasonable. DiMA, for example, states that "[s]ampling, though 'imperfect,' historically produces reasonably accurate results and reliable

Sample Reporting is Neither Reasonable Nor Supported by Record Evidence

members that sampling of their monthly transmissions would be reasonably accurate and create reliable proxies? Moreover, if DiMA is correct that census reporting would track tens of

millions of performances, which would generate thousands of dollars in royalties for artists and

proxies that fairly compensate rightholders."<sup>33</sup> Yet where is the evidence from DiMA's

B.

<sup>&</sup>lt;sup>32</sup> Comments of Radio Broadcasters at 9 ("[T]here are literally thousands of Section 112 and 114 statutory licensees – consisting of radio broadcasters and others – who employ a myriad of software applications to schedule and play music.").

<sup>33</sup> Comments of DiMA at 4.

copyright owners, then the artists performing on and copyright owners of those recordings should be paid for that exploitation, but that is only possible with census reporting.

The CRB must conclude that, based on the record in this proceeding, there is no evidence to support sample reporting. Cursory references to the practices of ASCAP and BMI, without even disclosing the sampling methodologies applied by those organizations, are insufficient for concluding that sample reporting under Section 114 is warranted.<sup>34</sup> SoundExchange's studies have shown that sample reporting will deprive enormous numbers of copyright owners and performers of royalties, an outcome that is not reasonable.

Statutory Licensees Are Obligated to Provide Copyright Owners with Notice of C. Use of Sound Recordings and Cannot Shift the Burden of Recordkeeping to Copyright Owners and Performers

Statutory licensees, not surprisingly, believe that SoundExchange should bear the burden of enabling reporting by thousands of services. According to the Radio Broadcasters,

[i]t would be far more efficient to require SoundExchange to make reasonable modifications to its music use processing software to enable it to accommodate a variety of music use reporting formats . . . than to force each of the licensees to create music use reports in a single dictated format that does not take into account either the capabilities and limitations of their software (if they use software at all) or the size of their labor pool.35

As noted above, Radio Broadcasters have failed to provide any evidence to support this position. First, Radio Broadcasters have failed to submit evidence that it is more efficient for

<sup>34</sup> SoundExchange notes that in addition to sample reporting, ASCAP and BMI each undertake extensive, additional efforts on their own to monitor transmissions by broadcasters. According to a witness who testified on behalf of statutory licensees in the first webcaster arbitration, ASCAP, BMI, and SESAC "distribute royalties based, inter alia, on data they have obtained from surveys and other third party sources at their own cost." Comments of Radio Broadcasters at 6-7 (citing In re Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 200-9 CARP DTRA 1&2, Written Rebuttal Testimony of Ronald Gertz, ¶ 12 n.9 (Oct. 4, 2001)) (emphasis added); see also Ryan Underwood, BMI's Move Stirs Up Technology Battle, Tennessean.com, Sep. 12, 2005, available at

http://tennessean.com/apps/pbcs.dll/article?AID=/20050912/BUSINESS01/509120345/1044/BUSINESS (visited Sep. 16, 2005) (describing BMI and ASCAP efforts to acquire and develop monitoring applications to track public performances of musical works).

35 Comments of Radio Broadcasters at 9.

SoundExchange to develop a system that can handle reporting from untold numbers of licensees and unidentified music use processing software programs than for the individual licensees to report the data in a common format. To the contrary, the evidence submitted by SoundExchange indicates that for the automated exchange of data, fixed standards need to be adopted that are agnostic across software platforms. Second, Radio Broadcasters have failed to identify more than three music use processing software programs and the capabilities or limitations of those programs. Without detailed specifications on the different software applications in the market or information on their limitations, the CRB cannot conclude that those applications, either in their current form or through minor modifications, are incapable of providing data in the format proposed by SoundExchange.<sup>36</sup> Third, Radio Broadcasters provide no evidence on how easy or complicated it would be for SoundExchange to develop systems capable of receiving reports of use in multiple formats without common standards. That is because, as SoundExchange's sworn evidence shows, those costs would be very substantial.

At bottom, the bulk of the licensees' complaints are based on their claim (which SoundExchange disputes) that there are no tools/software in the marketplace to allow them to report in the manner that SoundExchange has proposed. Even if true (and it is not), that problem will be solved the day the CRB issues rulings that make clear the specific format for reporting. As soon as that occurs, there will be no shortage of available tools being developed for the licensees.

<sup>&</sup>lt;sup>36</sup> Noncommercial entities have also argued that copyright owners and performers should bear the burden of recordkeeping because educational radio stations, staffed by students/volunteers, cannot be burdened with modern reporting requirements. Yet to the extent that campus webcasting is supposed to "develop students' skills in management techniques, programming techniques, applied engineering, music, etc.," it is not credible to claim that basic computer skills – which are prerequisite for other radio jobs – and providing reporting required of commercial stations is not part of their education. See, e.g., http://www.beaweb.org/04jobs/jobshu.html (advertisement for general manager position of Seton Hall University radio station describing knowledge of Excel as "essential") (visited Sep. 16, 2005).

## III. SPECIFIC FACTUAL QUESTIONS

## A. Spreadsheets

SoundExchange has provided detailed information on how spreadsheets can be used to provide reports of use and how easy it is to complete those spreadsheets. Contrary to the unsupported claims of Radio Broadcasters, no one would need to, among other things, "arrange the fields in the required order" or "convert the spreadsheet into ASCII format." The template created by SoundExchange would do that, and licensees would simply need to input identifying information for each sound recording transmitted and provide the other minimal information needed to complete a report of use, such as naming the file with the appropriate information. As SoundExchange has previously explained, this should be easy for anyone simulcasting over the Internet.

## B. <u>Commercially Available Software is Either Available or Soon Will be</u> Following the Adoption of Regulations

SoundExchange has long maintained that once format and delivery specifications are established, vendors will develop products that provide reports of use in the required format.<sup>38</sup> The comments submitted by Harvard Radio Broadcasting Co., Inc. ("WHRB") indicate that this is already happening. WHRB identified a company called Spinitron as providing a beta product that allows webcasters to create play logs and, according to WHRB, Spinitron believes it will be able to modify its current beta product to generate reports of use in the proposed format.<sup>39</sup> If a two-person outfit such as Spinitron is confident that it can modify a beta product to generate Section 114 reports of use, then it is difficult to imagine that the companies that developed RCS Selector, MusicMaster, and PowerGold could not make similar modifications.

<sup>&</sup>lt;sup>37</sup> Comments of Radio Broadcasters at 14.

<sup>&</sup>lt;sup>38</sup> Comments of RIAA in Docket No. RM 2002-1A at 35 (Apr. 5, 2002); Reply Comments of RIAA in Docket No. RM 2002-1A at 43-45 (Apr. 26, 2002).

<sup>&</sup>lt;sup>39</sup> Supplemental Comments of WHRB at 13.

Similarly, several of DiMA's members are currently providing electronic delivery of reports of use to SoundExchange and those companies must have either developed their own software to generate the reports of use or they are relying upon third-party products. Radioio identifies its own custom-developed software and some of its capabilities but then fails to explain why its software cannot provide reports of use in the format requested by SoundExchange. 40 Radioio also fails to disclose how long it took and what it cost to develop that custom application.41

Thus, both the evidence and common sense demonstrate that commercially available tools are currently available and more will be available as soon as the CRB issues regulations.

C. The Development of a Web-Based Reporting Application Would Impose Significant, Additional Costs Upon Copyright Owners and Performers and Should Not be Mandated by the CRB

SoundExchange submitted detailed information on the issues and range of costs involved in developing a web-based reporting application. 42 No other entity has identified for the CRB the complexity or cost involved in developing such an application. Instead, lawyers have made arguments, unsupported by evidence, that SoundExchange should be able to develop such an application without much difficulty. For example, Radio Broadcasters argue that because BMI has a web-based tool, it must be reasonable for SoundExchange to incur this cost. 43 However. Radio Broadcasters failed to introduce any evidence on how much BMI spent to develop its webbased tool although SoundExchange suspects that BMI spent several million dollars. But without evidence as to the actual costs incurred by BMI, the CRB cannot conclude that such

<sup>&</sup>lt;sup>40</sup> Comments of Radioio at 5-6.

<sup>&</sup>lt;sup>41</sup> Although Radioio appears to have the technological capability to generate reports of use, SoundExchange is not aware of any reason why Radioio has failed to pay statutory royalties for any period after September 2004. Because it is still making transmissions of sound recordings but failing to pay royalties, Radioio is likely infringing the copyrights of many different copyright owners.

42 See Comments of SoundExchange, Exhibit A, Declaration of Shane Sleighter at 7-10.

<sup>&</sup>lt;sup>43</sup> Comments of Radio Broadcasters at 18-19.

expenditures would be reasonable. Radio Broadcasters have also failed to account for the size differences between BMI (which recently announced revenues of more than \$728 million for its most recent fiscal year)<sup>44</sup> and SoundExchange (an organization that collected only \$19 million in statutory royalties in 2004). Therefore, to look to what BMI has in order to determine what SoundExchange should do is unavailing.

SoundExchange believes the CRB lacks the authority to impose upon copyright owners and performers, or their agent, SoundExchange, the types of expenditures that have likely been incurred by BMI to develop a web-based reporting tool. Moreover, such expenditures, to benefit the licensees, cannot be justified at the current level of statutory royalty payments. Thus, the CRB must reject the suggestion that SoundExchange be compelled to accept the delivery of reports of use via a Web site.

## The File Naming Protocols Proposed by SoundExchange are Not Burdensome and the CRB Should Adopt a Single Standard for File Naming D.

As SoundExchange has explained, there is nothing cumbersome about naming a file with start and end dates in the form "DDMMYYYY." However, what is most important is that the CRB adopt a single standard for the reporting of dates by all services providing reports of use under 37 C.F.R. § 270.3, whether that be "DDMMYYYY" or "MMDDYYYY," or even some other format. As Mr. Sleighter explained in his declaration, final regulations cannot allow licensees to provide date ranges in any format they choose. 45 Such flexibility would impose tremendous burdens on SoundExchange.

<sup>&</sup>lt;sup>44</sup> See BMI Posts World's Highest Performing Rights Revenues; Tops \$700 Million-Plus Milestone (Sep. 12, 2005), available at <a href="http://www.bmi.com/news/200509/20050912a.asp">http://www.bmi.com/news/200509/20050912a.asp</a> (visited Sep. 14, 2005). <sup>45</sup> Comments of SoundExchange, Exhibit A, Declaration of Shane Sleighter at 10.

Because numerous services are already providing reports of use voluntarily using the file naming protocols proposed by SoundExchange<sup>46</sup> and because no evidence has been submitted to support another naming convention, SoundExchange requests that the CRB adopt the convention proposed by SoundExchange.

#### E. Providing Reports of Use With Headers

#### 1. Providing Reports of Use with Headers is Not Burdensome

SoundExchange created the option for services to provide reports of use with headers at the request of several DiMA members. These companies had requested that SoundExchange accept reports with headers because their inclusion would enable licensees to review the headers in a file and determine the contents of the file. SoundExchange was told that this would help the licensees in managing their own reporting obligations. Without headers, the contents of a file could only be determined by uploading and processing the file or otherwise examining the contents

SoundExchange accommodated this request even though it was not receiving reports with headers from the preexisting subscription services. The preexisting subscription services do not provide any header information in their reports of use, they simply have to provide the data in the order and using the field delimiters and text indicators specified in the regulations.<sup>47</sup>

If services do not want to submit reports with headers, they can choose to provide reports without headers. The option of reports with headers, however, provides greater flexibility for the service. They can choose text indicators and field delimiters provided that such characters do not appear in the reported data for the reasons explained by Mr. Shane Sleighter. But to the extent licensees are claiming that providing reports with headers would be overly burdensome or costly,

<sup>&</sup>lt;sup>46</sup> <u>See id</u>. at 6.
<sup>47</sup> <u>See</u> 37 C.F.R. §§ 270.2(e) & (g).

there has been no evidence submitted to support this argument – only argument of counsel. For example, the Radio Broadcasters allege that "[t]here would be significant costs incurred, and no appreciable corresponding benefits, from requiring services to report the first six lines of information set forth in SoundExchange's proposal" or to provide start and end dates for a data file. 48 But those burdens and costs are not identified. In fact, one must question the argument of counsel that typing in the (1) name of a service, (2) name of a contact person, (3) street address, (4) city, state, zip, and country, (5) phone and (6) e-mail would be burdensome, particularly where this information could be prepared once and copied to successive reports of use as required.49

Further, for services to maintain that the information requested in the first six rows of data can easily be obtained from the Notice of Use of Sound Recordings filed with the Copyright Office is unavailing.<sup>50</sup> First, licensees are not required to serve a copy of the Notice of Use upon SoundExchange. Second, the first six rows of header information are requested so that a report of use can be tied to a particular licensee with the name of a contact person in the event of a problem. To argue that SoundExchange can obtain the information elsewhere is like saying a taxpayer should not have to include their name, address, and social security number on Internal Revenue Service ("IRS") Form 1099 because the IRS is already in possession of that information for each taxpayer - or at least for those who previously submitted tax returns. This argument is without merit.

<sup>48</sup> See Comments of Radio Broadcasters at 27-28; id. at 27 ("[T]he labor costs that services would incur from having to insert [first six rows of data] into each and every music use report would be substantial.").

49 Radioio alleged that the inclusion of the limited information requested in rows 1 though 13 "would create massive

files." Comments of Radioio at 3. To test Radioio's allegation that "massive" files would result from completing the first thirteen rows of information in a file with headers, SoundExchange created an Excel spreadsheet using the name of undersigned counsel and a service name of SoundExchange.com, and also completed the other eleven rows of data as required in a file with headers. The result was a file of less than 13 kilobytes. <sup>50</sup> Comments of Radio Broadcasters at 26.

#### 2. Reports of Use With or Without Headers Cannot Vary in Order

Radio Broadcasters have argued that there is no need for the regulations to fix the sequence in which data is reported.<sup>51</sup> However, they once again fail to provide any support for this proposition – and certainly not a supporting declaration from an expert software developer. In contrast, the Declaration of Shane Sleighter indicates that "while software is smart enough to know when data fields are in a delimited file, it is not capable of determining what order data is in."<sup>52</sup>

As has been noted previously in these Reply Comments, it is not sufficient for licensees to argue that SoundExchange's system can "readily, and reasonably" be modified to accommodate the various reporting orders and formats that could be utilized by untold numbers of licensees.<sup>53</sup> Because licensees have failed to disclose the capabilities of their software, there is no way for the CRB to gauge the cost or amount of work that would be required for SoundExchange to modify its systems to accommodate all of these various systems. There is no doubt that the costs would be substantial.

It is essential that the CRB adopt regulations that fix the order of data to be reported by licensees. While flexibility could be appropriate if reports of use were provided in extensible markup language ("XML"), that format requires a much greater level of sophistication by the licensees, 54 which the Radio Broadcasters claim does not exist, particularly among those stations still scheduling music in DOS or tracking sound recordings transmitted on note cards.<sup>55</sup> Further,

<sup>&</sup>lt;sup>51</sup> See id. at 29.
<sup>52</sup> See Comments of SoundExchange, Exhibit A, Declaration of Shane Sleighter at 14.

<sup>53</sup> Comments of Radio Broadcasters at 31.

<sup>&</sup>lt;sup>54</sup> <u>Id</u>. at 14-15

<sup>55</sup> SoundExchange questions how, on the one hand, noncommercial entities can claim that their student volunteers lack the sophistication to provide reports of use in the format requested by SoundExchange but, on the other hand, propose that the CRB adopt XML, a reporting language requiring a high degree of technical competence, as the format and delivery standard. See Comments of WHRB at 19-20. To the extent some commenting parties believe

XML would still require the development of standards, such as the tags that would identify the data surrounded by the tag. 56

Radio Broadcasters also allege that "the eleventh and twelfth lines of proposed information (text indicator and field delimiter) should simply be read and identified from the header row or the lines of data themselves, as the field delimiter will always be the first character that appears in a row of data and the text indicator will always be second."57 As there is no support cited for this statement - which is simply incorrect - we do not know how or why the Radio Broadcasters got this so wrong. However, if data is reported as SoundExchange requested,

^NAME OF SERVICE^|^TRANSMISSION\_CATEGORY^|^FEATURED ARTIST^|^SOUND RECORDING TITLE^|^ISRC^|^ALBUM TITLE^|^MARKETING LABEL^|^ACTUAL TOTAL PERFORMANCES^|^AGGREGATE TUNING HOURS^|CHANNEL OR PROGRAM NAME^|PLAY FREQUENCY^

the first character in the data row would be the carat (^) mark, which could be a text separator, not a field delimiter, but the second character in the data row would be the first character of the name of the service, not a field delimiter.

> Field Delimiters and Text Indicators May Vary in a Report With Headers Provided that the Delimiter or Text Indicator Does Not Appear in the Data Reported

As Mr. Sleighter explained in his declaration, licensees have the flexibility to use delimiters and indicators of their choosing provided that such delimiters and indicators do not appear in the data being reported.<sup>58</sup> If field delimiters or text indicators were to appear in a data

XML would be a more appropriate reporting format, SoundExchange notes that those advocates have failed to submit to the Copyright Office, the CRB, or SoundExchange any proposed specifications for consideration and

 <sup>56</sup> See Comments of SoundExchange, Exhibit A, Declaration of Shane Sleighter at 14-15.
 57 Comments of Radio Broadcasters at 28-29 (emphasis added).

<sup>58</sup> Comments of SoundExchange, Exhibit A, Declaration of Shane Sleighter at 15-20. For example, if Radioio wants to use a delimiter of a double colon "::" (Comments of Radioio at 3) in a file with headers, then SoundExchange

field, however, then SoundExchange's system would read the reported data incorrectly and SoundExchange would not be able to process a log automatically. Also, while Radio Broadcasters say that "[i]t is a simple matter for software to locate and recognize the characters used in a particular file as field delimiters and text indicators and to treat them accordingly,"59 this is merely the argument of counsel and there is no independent support for this statement. If these solutions were so simple, then one is left to wonder why these simple solutions could not be adopted by the licensees.

#### Abbreviations Increase Costs and Inefficiencies in Log Processing F.

Several licensees have suggested that the use of abbreviations should be permitted and that common abbreviations would not increase the burden on SoundExchange to process reports of use. Radio Broadcasters, for example, suggest that common abbreviations can be easily recognized by SoundExchange's software using "fuzzy" matching. 60 According to the Web site www.scarchenginedictionary.com,

[f]uzzy matching attempts to improve recall by being less strict but without sacrificing relevance. With fuzzy matching the algorithm is designed to find documents containing terms related to the terms used in the guery. The assumption is that related words (in the English language) are likely to have the same core and differ at the beginning and/or end. A search for "matching", for example, would also return documents containing match, matched etc. Unfortunately it will also return documents containing unrelated words like matchbox etc.61

As the above definition indicates, "fuzzy matching" can assist in narrowing potential matches but it will require SoundExchange staff to manually review thousands of data entries to

could receive and process a report with that delimiter provided that the double colon did not appear in any data field. However, contrary to the assertions of WHRB, comma separated values, although widely adopted for certain data reporting, cannot be used in reports of use provided pursuant to Section 114(f)(4)(A) because commas frequently appear in the names of sound recordings, albums or performing artists. See Comments of SoundExchange, Exhibit A, Declaration of Shane Sleighter, at 18-20 & Tabs 2-4.

59 Comments of Radio Broadcasters at 31-32 (emphasis added).

<sup>61</sup> http://www.searchenginedictionary.com/terms-fuzzy-matching.shtml (visited Sep. 15, 2005).

ensure that fuzzy matches correctly identify the artist or copyright owner to be paid for the performance of a specific recording (e.g., someone would need to manually review the word "matchbox" to delete it as a possible match to the searched term "matching"). Because human intervention decreases processing efficiency and increases costs, SoundExchange questions how a proposal to allow the use of abbreviations can be warranted – particularly when the services will have the product (either physical or digital) identifying without abbreviation the requested information. SoundExchange is simply asking that licensees be required to provide information as it is presented on the product from which they obtain a sound recording. If abbreviations are not used on the underlying product, SoundExchange should not have to guess the abbreviating conventions used by each of thousands of potential statutory licensees. Similarly, if a sound recording is released with "JR." as part of an artist's name, then the service would not pot be submitting an abbreviation if it submitted "JR." in its report of use. The regulations should require that services report data as it is displayed on the product from which a sound recording is obtained.

G. Commercial Databases Are Available to Statutory Licensees and the CRB Lacks
Authority to Expropriate SoundExchange's Proprietary Database for the Benefit
of Licensees

Not surprisingly, licensees are once again seeking a regulation that compels

SoundExchange to turn over all of the data that exists in its proprietary database. <sup>63</sup> Although the information stored in SoundExchange's database, which information was obtained from

<sup>&</sup>lt;sup>62</sup> Radio Broadcasters themselves have noted that there are "[t]oo many permutations for rules to anticipate fully all abbreviations." Comments of Radio Broadcasters at 35.

<sup>&</sup>lt;sup>63</sup> Licensees should be aware that they are frequently in possession of information on new releases far in advance of SoundExchange's receipt of such information, thus making the SoundExchange database substantially less reliable than might otherwise be expected. In addition, the Section 114 statutory license does not require copyright owners to provide a common agent with identifying information for individual sound recordings. As noted previously, the only reporting obligation Congress has created in Section 114 is for licensees to provide copyright owners with their notice of use of specific sound recordings.

copyright owners, featured recording artists, foreign performing rights societies, and commercial vendors, in addition to raw data contained in reports of use provided by licensees, may contain information of a factual and not proprietary nature, the organization and compilation of the database is proprietary and highly valuable. Therefore, and contrary to WHRB's argument, SoundExchange should not be compelled to make this database available to the public without compensation.

In arguing that SoundExchange should be compelled to provide access to its database, the licensees are essentially saying that services like Lexis and Westlaw must also be compelled to provide free access to their database of court decisions because those decisions are in the public domain. This is an absurd argument when applied to Lexis and Westlaw and is similarly absurd when applied to SoundExchange. The CRB lacks the authority to expropriate SoundExchange's database for the benefit of licensees.

Furthermore, in arguing that access to SoundExchange's database would ease the reporting burden and costs on licensees, the licensees have failed to introduce any evidence (1) supporting their financial claim that their burden would be eased or (2) specifications on how interaction with the SoundExchange database would function.<sup>64</sup> If the licensees wanted a complete version of the database delivered to them in machine readable form, then they have failed to submit detailed specifications on how that EDI would occur.

In seeking access to SoundExchange's database, the licensees have also failed to disclose to the Copyright Office or the CRB other available resources.<sup>65</sup> Two of the best known music

<sup>&</sup>lt;sup>64</sup> The Radio Broadcasters say that it "would be tremendously useful if [the SoundExchange database] had the ability to 'sync up' with the services' music information databases," but they fail to provide any guidance on how that "syncing up" would occur. Comments of Radio Broadcasters at 36. Unfortunately, the Radio Broadcasters, as usual, make statements but then fail to provide sufficient evidence to evaluate their suggested approach.

<sup>65</sup> The easiest reference source available to licensees will always be the product from which they obtained the sound recording transmitted under statutory license.

databases are offered by AMG and Gracenote. The AMG allmusic Web site,

<u>www.allmusic.com</u>, for example, provides a robust database that is free for noncommercial

purposes. But if a service wishes to use the database for commercial purposes, then they must

obtain a license and presumably pay a royalty to the owner of the database. <sup>66</sup> The database of

sound recording information offered by Gracenote, <u>www.gracenote.com</u>, reportedly contains

4,025,621 CDs and 51,445,542 songs. <sup>67</sup> The Gracenote database is free-of-charge for personal

and non-commercial use, but may be available as a resource to statutory licensees under a

license. <sup>68</sup> If licensees wish to obtain access to a database of sound recording metadata, then they

are free to purchase a license to use commercially available products, just as they purchase

licenses for many of their other business needs. <sup>69</sup> However, they have no right to expect free

access to SoundExchange's proprietary database that was built with the royalties that would

otherwise have been distributed to copyright owners and performers.

scrutinized.

<sup>&</sup>lt;sup>66</sup>The Frequently Asked Question ("FAQ") section of the All Music Guide database has the following question and answer:

I am interested in using the allmusic content for business purposes.

The AMG Web sites are for non-commercial use only. Per our Terms of Service, any use of the site for commercial purposes is prohibited without prior arrangement. If you are interested in using the site for such purposes, or if you wish to license AMG content databases, please contact us for further information. http://www.allmusic.com/cg/amg.dll?p=amg&sql=32:amg/info\_pages/a\_faq\_general.html (visited Sep. 15, 2005). 67 See Gracenote Music Search homepage, available at http://www.gracenote.com/prof/music/index\_old.html (visited Sep. 15, 2005). Gracenote also appears to offer applications that enable users to create playlists (Gracenote Playlist<sup>SM</sup>) and identify music for both CDs and individual music files (Gracenote MusicID<sup>SM</sup>). See Exhibit B attached hereto. It would appear as though these applications could assist licensees in providing the reports of use requested by SoundExchange but, again, the licensees have neither identified these applications nor explained why they could not provide the very information the licensees seek to expropriate from SoundExchange. 68 See Gracenote FAQ at http://www.gracenote.com/corporate/FAQs.html (visited Sep. 15, 2005). 69 WHRB identifies a music metadata database offered by MediaUnbound, Inc. See Comments of WHRB at 26, n.21. A review of the website for MediaUnbound, Inc., www.mediaunbound.com, does not indicate the cost for licensing the database but there is no indication that MediaUnbound's AudioInsight<sup>TM</sup> system is available gratis. If the President and CEO of MediaUnbound, Michael Papish, who also signed WHRB's Supplemental Comments, can demand licensee fees for the use of MediaUnbound's music metadata database, SoundExchange questions how he can in good faith argue for the expropriation of SoundExchange's database when such expropriation would materially benefit his own company. His proposals and motives - and those of WHRB - must be carefully

## H. The Delivery of Multiple Data Files is No Longer Feasible

Although SoundExchange had previously proposed to allow services to submit multiple data files per reporting period, the services' vociferous objection to that proposal resulted in SoundExchange's developing systems that required the inclusion of all reporting information by transmission type in a single file. It is therefore unreasonable to compel SoundExchange to incur additional expenses to develop report processing capabilities to handle multiple data files when the services had the option of accepting this method over three years ago but then chose to reject it in an attempt to discredit the RIAA and SoundExchange.

By way of background, SoundExchange<sup>70</sup> had originally proposed that licensees provide two reports of use for every reporting period: (1) a Playlist Log that would detail the sound recordings transmitted and (2) a Listener Log that would track transmission activity.<sup>71</sup> SoundExchange proposed to overlay the Listener Log, which would not contain personally identifiable information, on the Playlist Log and then determine the amount of listenership for each sound recording transmitted in order to calculate the amount of royalties that should be allocated to each of those recordings. Sound recordings transmitted to more listeners would receive more royalties than those transmitted to fewer listeners.

SoundExchange believed that its proposal for a Listener Log and Playlist Log would alleviate potential burdens on licensees because SoundExchange would incur the time and expense of marrying up data on sound recordings transmitted with the amount of listenership to those recordings. However, even before comments were filed in response to the February 7,

At the time the petition was filed, SoundExchange was an unincorporated division of the RIAA.
 RIAA Petition for Rulemaking to Establish Notice and Recordkeeping Requirements for the Use of Sound Recordings In Certain Digital Audio Services (May 24, 2001).

2002 NPRM, 72 SoundExchange received so many complaints from licensees that it abandoned the proposal for a separate Listener Log and Playlist Log. This is why the record of comments filed in response to the February 7, NPRM has licensees objecting to a proposal that SoundExchange simultaneously withdrew.<sup>73</sup>

In objecting to a Listener Log, licensees complained that it would create additional burdens for them, including having to obtain streaming logs from third parties and providing enormous amounts of data.<sup>74</sup> According to the Radio Broadcasters, they

[t] ypically use third party services to stream their broadcast programming over the Internet. Most do not receive server records from their respective service providers on a listener-by-listener basis. In response to broadcaster inquiries, these third parties report that such logs may be technically feasible, but would require expensive development work to implement. Of course, Broadcasters would be forced to rely upon the accuracy of third-party data rather than attesting to it themselves.<sup>75</sup>

The Radio Broadcasters are making similar arguments today - but they've switched sides and are now advocating for a Listener Log. In their most recent comments the Radio Broadcasters said:

It is not only possible, but logical and feasible, for certain categories of data to be submitted in separate files. For example, for services reporting under the ATH option, allowing the separate submission of ATH listener data is a critical element that the format regulations should permit. For radio stations, music playlist data and listener data come from separate and wholly unrelated sources. While playlist data typically is output from a station's music scheduling software or digital automation system, listener data comes from a station's stream provider. If radio stations were required to submit these two vastly different types of data in the same file, stations would be forced to add a field to their playlist data and then manually input ATH data into that field, thus significantly increasing their reporting burden.<sup>76</sup>

<sup>72</sup> Notice of Proposed Rulemaking for Notice and Recordkeeping for Use of Sound Recordings Under Statutory

License, Docket No. RM 2002, 67 Fed. Reg. 5761 (Feb. 7, 2002).

Compare Joint Comments of Radio Broadcasters in Docket No. RM 2002-1 at 54-55 (Apr. 5, 2002); Comments of Beethoven.com in Docket No. RM 2002-1 at 3-4 (Apr. 5, 2002); Comments of the Electronic Frontier Foundation, the Electronic Privacy Information Center, Fresno Free College Foundation, KFCF (88.1 FM), and KPFA Radio in Docket No. RM 2002-1 at 3 (Apr. 5, 2002) with Comments of RIAA in Docket No. RM 2002-1 at 32-33 & n.7

<sup>(</sup>Apr. 5, 2002).

74 See Joint Comments of Radio Broadcasters in Docket No. RM 2002-1 at 55 (Apr. 5, 2002). <sup>75</sup> <u>Id</u>.

<sup>&</sup>lt;sup>76</sup> Comments of Radio Broadcasters at 38-39.

Although it is not surprising that the Radio Broadcasters changed their position on this issue, they often appear to do so simply to object to any proposal submitted by SoundExchange. If the Radio Broadcasters believe that it is easier for them to provide two data files to create a single report of use for a reporting period, then they should have said that back in 2002 and suggested amendments to the proposal set forth in the Copyright Office's February 7, 2002 NPRM. But for them to object to a proposal of two data reports in 2002 without providing a constructive alternative, remain silent for three years, and now, after SoundExchange has expended several million dollars to develop systems designed to, among other functions, process a single, unified report of use, and propose that licensees be permitted to provide what is akin to a Playlist Log and a Listener Log, raises questions about whether this is in fact a good faith proposal. After all, if the Radio Broadcasters were now advocating the adoption of regulations that permitted the delivery of two reports of use similar to a Playlist Log and a Listener Log, they should have submitted proposed format and delivery specifications for the CRB's and all other interested parties' consideration.

### IV. CONCLUSION

After nearly four years, the Copyright Office and the CRB have received proposed format and delivery specifications from only one party – SoundExchange. SoundExchange has endeavored to offer licensees multiple options for fulfilling their statutory obligation of providing reasonable notice of use. In each instance where a dispute has arisen, SoundExchange has provided evidence – not legal argument – for why SoundExchange's proposals should be adopted. The same cannot be said of the statutory licensees. Even at this late date they have failed to offer a single proposal for how data should be formatted and delivered. They simply say that SoundExchange's proposals are not reasonable, too burdensome, and not consistent with current industry practice. However, they offer little if any support for their positions; simply the

argument of counsel. Because SoundExchange has submitted reliable evidence in support of its positions, the CRB should adopt the format and delivery specifications proposed by SoundExchange.

This proceeding has been more than frustrating. The delay in the adoption of complete recordkeeping regulations has harmed artists and copyright owners. Each day that passes without format and delivery regulations means another day that SoundExchange cannot distribute royalties. For the small businesses represented by SoundExchange – and SoundExchange's constituents are overwhelmingly small businesses – this is unacceptable. Artists and copyright owners already had to accept an imperfect proxy distribution methodology when statutory licensees were permitted to avoid their obligation to provide *any* reports of use for the period October 28, 1998 through March 31, 2004. And even though licensees had an obligation to maintain records of use as of April 1, 2004 while awaiting the determination of format and delivery specifications, SoundExchange expects to hear licensees complain that they cannot provide any reports for the period April 1, 2004 through the date that the CRB issues format and delivery specifications because they failed to retain such data. To avoid further harm to artists and copyright owners, SoundExchange respectfully requests that the CRB adopt format and delivery specifications without further delay.

The Copyright Office Notice of Proposed Rulemaking in Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1F, 69 Fed. Reg. 42007, 42008 (July 13, 2004) ("[W]hile the reports of the preexisting subscription services may be a reasonably close approximation of the performances of sound recordings . . ., it is unavoidable that some copyright owners and performers will not receive full compensation for use of their works and others will receive no compensation at all if their works were performed by webcasters but not by any of the preexisting subscription services.") (emphasis added).

78 See id. at 42009.

SoundExchange is available to answer any remaining questions the CRB may have.

Respectfully submitted,

SOUNDEXCHANGE, INC.

Gary R. Greenstein General Counsel SOUNDEXCHANGE, INC.

1330 Connecticut Avenue, N.W., Suite 330

Washington, D.C. 20036

Dated: September 16, 2005

# SoundExchange Financial Statement Inception through Calendar 2005

	FY2000	FY2001	FY2002	FY2003	Total	FY2004	Apr - Dec 2004 Actual	Estimated Actual 2005
Costs Allocable Across All Statutory Licenses								
Operating Expenses	Į.	ļ						-
Personnel	-	-	1,475,141	1,406,821	2,881,962	1,416,148	1,094,447	1,700,000
Operating expenses	194,633	317,836	410,394	377,945	1,300,808	481,724	479,296	670,000
Member Services General Legal and Bus. Dev.	- 1	68,720	29,461	57.054	155,235	72.881	1 100,718	346,000
General Legal and Bus. Dev.	. 1	1	1	The second	NAMED		1	
Total Operating Expenses		• <del></del>		TILL MEL	MUILU			
Royalty Systems								
Amortization New Development			496,031	496,031	992,062	496,031	594,372	894,931 160,000
Total Royalty Systems	-	-	496,031	496,031	992,062	496,031	594,372	1,054,931
Total Costs Allocable Across								]
All Statutory Licenses	198,859	390,411	2,441,522	2,362,848	5,393,640	2,467,369	2,336,225	4,443,061
Licensing & Legal				l	1	ı		
				DEN	ACTED			

Total Licensing & Legal

Total Expenses

			- III. Ling sky		· ·		
··· - ·		1,635	796,251	797,886	469,191	295,648	-
	1	(					
198,859	390,411	2,443,157	. 3,159,099	6,191,526	2,936,550	2,631,873	4,443,061

## **ATTACHED NOTES**

13 Copies

## SoundExchange Financial Statement Inception through Calendar 2005

1					·		Apr - Dec 2004	Estimated
ţ	FY2000	FY2001	FY2002	FY2003	Total	FY2004	Actual	Actual 2006
Expenses Attributable Per License			.	-				
Webcasters Ephemeral			ľ		2,682,490 258,837	1,477,246 142,541		1,185,401 184,284
· · · · · · · · · · · · · · · · · · ·				BE	DACTE	)	91440F1 171 F7 131 A	
Total Expenses Recon.					6,191,526	2,936,550	2,631,873	4,443,061
Royalties Collected					}		1	
Webcasters Ephemeral					12,795,838 1,234,686	7,792,051 751,865		11,251,564 1,749,179
		REDA	CTED				tracer sections to the section of	
Total Royalties Collected	6,162,718	2,122,312	3,074,107	3,925,461	32,846,829	15,632,476	15,548,549	42,172,534
Interest Income	341,659	544,457	367,449	224,991	1,478,555	228,111	289,465	935,809
Attributable to Webcasters Attributable to Ephemeral					575,987 55,578			
				BEDAG	TED	: • •		
Total Interest Income Recon.	ſ		( '	1	1,478,555	228,11	289,465	935,809
Total Revenues					34,325,384	15,860,58	7 15,838,014	43,108,343
Total Revenues Per License						1:		
Webcasters Ephemeral & BES					13,371,825 1,290,264	7,905,75 762,83		
		R	UACT	ED		•		
Total Revenues Recon.	6,499,462	2,413,551	3,335,925	4,012,052	34,325,384	15,860,58	7 15,838,01	1 43,108,343
Total Note Repaid		]	3,000,000	138,217	<u> </u>	415,68	575,09	7 1,915,852